TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 405.

AMERICAN EXPRESS COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED MAY 22, 1906.

(21,188.)

(21,188.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 405.

AMERICAN EXPRESS COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Placita	2	1
Petition	4	2
Answer	11	6
Stipulation of facts	20	12
Exhibit A—Articles of association and by-laws of the American Express Company (omitted in printing)	27	—
B—Annual card for 1906	54	16
C—Annual card for 1907	54	16
D—Stamp or paster book	54	16
E—Stamp or paster book	54	16
Replication	56	17
Opinion	57	17
Decree of April 24, 1908	72	31
Petition for appeal and assignment of errors	74	32
Order of April 24, 1908, allowing appeal	76	33
Appeal bond	77	33
Stipulation waiving citation	79	34
Clerk's certificate	80	35
Designation by counsel for appellant of parts of record to be omitted in printing and consent thereto	81	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 8, 1908.

1 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Mr. Edwin W. Sims, United States Attorney for the Northern District of Illinois for United States of America.

Mr. Lewis Cass Ledyard, Mr. Lawrence Maxwell, Jr., Messrs. Winston, Payne, Strawn & Shaw, Solicitors for American Express Company.

2 Pleas in the Circuit Court of the United States for the Northern District of Illinois-Eastern Division, in Chancery sitting at the United States Court room, in the City of Chicago, in said District and Division before the Honorable Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Friday, the twenty-fourth day of April, in the year of our Lord, one thousand nine hundred and eight, being one of the days of the regular December term of said Court, begun Monday, the sixteenth day of December, 1907, and of our Independence the one hundred and thirty-second year.

H. S. STODDARD, *Clerk.*

3 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Be it remembered that on this day to-wit: the second day of July 1907, come the United States of America by Edwin W. Sims, United States Attorney for the Northern District of Illinois, by and under the direction of Honorable Charles J. Bonaparte, its Attorney General and filed in the clerk's office of said Court its certain Petition in the words and figures following to-wit:

4 *Petition.*

28728.

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
v.
AMERICAN EXPRESS COMPANY.

Petition.

To the Honorable the Judges of the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division, sitting in Equity:

Your petitioner, the United States of America, by Edwin W. Sims, its attorney, for the Northern District of Illinois, acting by and under the direction of Honorable Charles J. Bonaparte, its Attorney General, brings this, its bill of complaint, against the American Express Company, a joint-stock association organized and existing under and by virtue of the laws of the State of New York, and, on information and belief, alleges and respectfully shows to your Honors:

First. That the said American Express Company for several months last past has been and now is engaged as a common carrier in the transportation of property by railroad in interstate commerce in the said United States, and during said time has been and now is subject to the provisions of the Act of Congress approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate Commerce," and also to the Act of Congress approved February nineteenth, nineteen hundred and three, entitled, "An Act to Further Regulate Commerce With Foreign Nations and Among the States," and also to all Acts of Congress amendatory of said Acts, including an act of Congress approved June twenty-ninth,
5 nineteen hundred and six and in force August twenty-eighth, nineteen hundred and six, entitled "An Act to amend an Act entitled 'An Act to regulate commerce' approved February fourth, eighteen hundred and eighty-seven and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

Second. That since the taking effect of the Act approved June 29, 1906, the said American Express Company, as required by law, has kept open for public inspection in its several offices respectively its printed tariffs and schedules showing the rates and charges for the transportation of property, in the interstate commerce aforesaid, which the said common carrier established and which were then in force upon its several routes respectively and, as required by law, filed copies of such tariffs and schedules with the Interstate Commerce Commission of the said United States.

Third. That the said defendant common carrier, since the taking

effect of the said Act approved June 29, 1906, unlawfully has given and issued franks for the free transportation of property to

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

and since the taking effect of said Act, and while its said printed tariffs and schedules were in force and effect, as aforesaid, unlawfully has transported and forwarded upon such franks, shipments of property for the holders of such franks from points within one state of the said United States to points within other states of the said United States without demanding or receiving any payment or compensation for such transportation; and that the said defendant common carrier is now unlawfully transporting upon such franks in numerous instances and in large quantities and over all of its lines of transportation, shipments of property for the holders of such franks from points within one state of the said United States to points within other states of the said United States without demanding or receiving any payment or compensation for such transportation, and in so doing unlawfully has been granting and giving, and unlawfully is now granting and giving concessions and discriminations in respect to the transportation of said property in interstate commerce whereby such property, by the device of issuing and by the use of said franks, has been transported at a less rate than that named in the said tariffs and schedules of the said common carrier published and filed by such common carrier as aforesaid, in violation of the statute in such case made and provided.

Which said property so transported and forwarded on said franks as aforesaid consisted of personal effects, merchandise, live stock, household goods and other articles and commodities, then and there being the personal and private property of and belonging to said persons to whom said franks had been issued, and for whom such shipments had been made as aforesaid.

Fourth. That the said defendant common carrier having filed its printed tariffs and schedules and kept the same open for public inspection as aforesaid, from and since the taking effect of said Act approved June 29, 1906, by the device of issuing franks as aforesaid and by the free transportation of said property in interstate commerce upon such franks, as aforesaid, has charged demanded and collected and received from certain persons, to wit, from

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

a less compensation for services rendered in said transportation of said property than said company then and there charged, demanded, collected and received from other persons, to wit, from such other persons as then and there paid to said defendant common carrier the rates which had been lawfully filed with the Interstate Commerce Commission, as aforesaid, by the said defendant carrier, and which were then and there in force and effect, for doing for them a like and contemporaneous service in the transportation of a like kind of property and under substantially similar circum-
7 stances and conditions, in violation of the provisions of said Acts.

Fifth. That the said defendant common carrier having filed its printed tariffs and schedules and kept the same open for public inspection, as aforesaid, from and since the taking effect of said Act approved June 29, 1906, by the device of issuing franks as aforesaid, and by the free transportation of said property in interstate commerce on such franks, as aforesaid, has unlawfully made and given undue and unreasonable preference and advantage to certain persons, to wit,

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

to the undue and unreasonable prejudice and disadvantage of such persons as then and there paid the full and lawful rates which had been and were then and there published and filed with the Interstate Commerce Commission, as aforesaid, by the said defendant carrier, in violation of the provisions of said Act.

Sixth. That the said defendant common carrier, having filed its printed tariffs and schedules and kept them open for public inspection, as aforesaid, from and since the taking effect of said Act approved June 29, 1906, by the device of issuing franks, as aforesaid, and by the free transportation of said property in interstate commerce on such franks, as aforesaid, has unlawfully charged, demanded, collected and received a much less and different compensation for the transportation of property, as aforesaid, for

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

between the points named in such tariffs so filed, as aforesaid, than the rates and charges which were then and there specified in
8 the tariffs filed by said defendant carrier, as aforesaid, and in effect at the time of such transportation.

Seventh. That the said defendant common carrier having filed its

printed tariffs and schedules and kept them open for public inspection, as aforesaid, from and since the taking effect of the said Act approved June 29, 1906, by the device of issuing franks, as aforesaid, and by the free transportation of said property in interstate commerce on such franks, as aforesaid, unlawfully has willingly suffered and permitted certain persons, to wit,

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

to obtain transportation for property at less than the regular rates established and in force on the lines of the said defendant common carrier, in violation of said Acts to regulate Commerce.

Eighth. That the said defendant common carrier intends to and will continue unlawfully to issue such franks to the several classes of persons above described, and intends to and will continue to unlawfully transport property of the kind heretofore described in this petition upon such franks, without demanding or receiving any payment or compensation for such transportation of property from the holders of such franks, from points within one state of the said United States to points within other states of the said United States over and throughout all of its lines of transportation within the said United States, unless restrained by the injunction of this Honorable Court.

Petitioner therefore prays that said defendant may be required to make answer to this petition, but not under oath, the answer under oath being hereby waived.

Wherefore, may it please your Honors to forthwith grant a writ of injunction directed to the said defendant, its agents, attorneys and all other persons acting or claiming or assuming to act under its authority and any and all persons acting in combination
9 with them or either of them from continuing each and any of the said unlawful proceedings aforesaid and especially from issuing any franks for the free transportation of property to

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

or to any of said persons, and from transporting and forwarding upon such franks, as aforesaid, without demanding or receiving the lawful rate of payment therefor, shipments of property for the holders of such franks, as aforesaid, from points within one state of the said United States to points within other states of the said United States; and from transporting and forwarding any property by any device whatever, or in any manner whatever at a less rate than that

named in the said tariffs and schedules published and filed by the said defendant common carrier as is required by the said Act to regulate commerce and the acts amendatory thereof.

And may it please your Honors to grant such other and further relief as law or equity may require and to your Honors may seem meet.

And your petitioner prays that a writ of subpœna may issue to the said defendant, the American Express Company, requiring it, under penalty and at a time and place to be therein stated and charged, to appear and answer all and singular the matters hereinbefore stated and charged, and abide by and perform such orders as the Court may make in the premises.

And your petitioner will ever pray.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed Jul-2-1907 H. S. Stoddard, Clerk.

10 And on the same day to-wit: the second day of July, 1907, come the American Express Company by its solicitor and filed in the clerk's office of said Court its certain Answer to the Petition heretofore filed herein. Which said Answer is in the words and figures following to-wit:

11 *Answer.*

28728.

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
v.
AMERICAN EXPRESS COMPANY.

The answer of the defendant the American Express Company to the Bill of Complaint filed herein by the United States of America, by Edwin W. Sims, its attorney for the Northern District of Illinois, acting by and under the direction of Honorable Charles J. Bonaparte, its Attorney General.

This defendant, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering saith:

First. This defendant admits that it has been for many years and now is engaged as a common carrier in forwarding property by railroad in interstate commerce in the United States, but denies that it has been or is engaged in the transportation of property by rail-

road except as such transportation is conducted by express companies as hereinafter set forth. It admits that since the taking effect of the Act of Congress approved June 29th, 1906, mentioned in said bill of complaint, it has been and now is subject to the provisions of the various Acts of Congress in that behalf mentioned and referred to in the First Article of said bill of complaint.

Second. This defendant admits that since the taking effect of the said Act approved June 29th, 1906, it has, as required
12 by law, kept open for public inspection in its several offices respectively its printed tariffs and schedules showing the rates and charges for the transportation of property in the interstate commerce aforesaid, which it established and which were then in force upon its several routes respectively, and, as required by law, filed copies of such tariffs and schedules with the Interstate Commerce Commission of the United States.

Third. This defendant admits that since the taking effect of the said Act approved June 29th, 1906, it has given and issued passes or franks for the transportation of certain classes of property to the several classes of persons mentioned in the Third Article of the said bill of complaint, but alleges that the passes or franks so issued to officials and employés of other express companies and of railroad and other transportation companies and their respective families, were issued only in exchange for like passes or franks issued to the officials and employés of the defendant by such express, railroad and other transportation companies, and this defendant denies that the giving or issuing of any of said passes of franks was in any wise unlawful; and while it admits that said passes and franks entitled the respective holders thereof to the transportation or forwarding of the property covered thereby, without any payment therefor in money, it denies that such transportation or forwarding was free.

This defendant further admits that since the taking effect of said Act, and while its said printed tariffs and schedules were in force and effect, it has transported or forwarded, upon such passes or franks, shipments of property for the holders of such passes or franks, from points within one state of the said United States to points within other states of the said United States, without demanding or receiving any payment or compensation for such transportation or forwarding other than the services rendered to this defendant by its own officials, agents, attorneys at law and employees, in the case of passes or franks issued to them, and other than said exchange of passes and franks in the case of passes or franks issued to the officials and em-
13 ployees of other express companies and railroad and other transportation companies, and this defendant denies that in issuing such passes or franks it has been granting or giving, or is now granting or giving, unlawful concessions or discriminations in respect of the transportation or forwarding of said property in interstate commerce, and this defendant denies that the issuing or use of said passes or franks was a device or intended as such, but alleges on the contrary that the said passes and franks were so issued by this defendant in the belief that its action was lawful and authorized by the Acts aforesaid. This defendant further admits that the property

so forwarded upon said passes or franks consisted of personal effects, being the personal and private property of and belonging to said persons to whom said passes and franks were issued, but denies that the same consisted of merchandise, live-stock, household goods and other articles and commodities.

Fourth. This defendant, denying, as it has heretofore denied, that the issuing of said passes or franks was a device, denies that by the issuing thereof or by the free transportation or forwarding of property thereon it has charged, demanded or collected or received from the persons to whom said passes or franks were issued a less compensation for services rendered in said transportation or forwarding of property than said company then and there charged, demanded, collected or received from other persons for doing for them a like and contemporaneous service in the transportation or forwarding of a like kind of property and under substantially similar circumstances and conditions.

Fifth. This defendant, denying, as it has heretofore denied, that the issuing of said passes or franks was a device, denies that by the issue thereof or by the transportation or forwarding of property in interstate commerce thereon it has unlawfully made or given any undue or unreasonable preference or advantage to the persons to whom said passes or franks were issued, to the undue or unreasonable prejudice or disadvantage of such persons as paid the rates
14 published and filed with the Interstate Commerce Commission by this defendant.

Sixth. This defendant, denying, as it has heretofore denied, that the issuing of said passes or franks constituted any device, admits that it has forwarded the property covered thereby in interstate commerce upon such passes or franks issued to the classes of persons above mentioned and without any payment or compensation therefor other than as above set forth, but denies that in so doing it has unlawfully charged, demanded, collected or received a less or different compensation for the transportation of property between the points named in such tariffs so filed than the rates and charges which were then and there specified in the tariffs filed by this defendant and in effect at the time of such transportation or forwarding.

Seventh. This defendant, denying, as it has heretofore denied, that the issue of such passes or franks constituted any device, and admitting, as it has heretofore admitted, that since the taking effect of said Act approved June 29th, 1906, it has forwarded upon such franks the personal effects of the various persons to whom the same were issued, as hereinbefore set forth, from one state to another state, denies that it has thereby unlawfully suffered or permitted said persons to obtain transportation for property at less than the regular rates established and in force on the lines of this defendant in violation of said Acts to regulate commerce.

Eighth. And this defendant, further answering, admits that it intends to and will continue to issue such passes or franks to the several classes of persons above described, and to transport or forward property covered thereby, without demanding or receiving any payment or compensation for such transportation or shipment from the

holders of such passes or franks, other than the compensation above mentioned, consisting of services and of the interchange of passes, from points within one state of the United States to points
15 within other states of the said United States and generally throughout its lines of transportation within the United States, unless restrained by the injunction of this Honorable Court, but it denies that said intention is in any wise unlawful.

Ninth. And further answering, this defendant alleges that it is an unincorporated association of individuals organized under a contract or articles of association or partnership, executed originally in the year 1850, renewed in the year 1859 and amended in the year 1868 upon the occasion of the merger with it of the Merchants Union Express Company, an organization of a similar character, similarly constituted.

That this defendant has never received any charter or franchise from the State and possesses only such powers as are or may be lawfully exercised by any body of individuals organized together for business purposes under the common law right of contract; that since the organization of this defendant it has continuously engaged in and prosecuted the various forms of business and enterprises set forth in its articles of association and is still engaged in the prosecution thereof; that among the forms of business thus carried on by the defendant is that generally known as the "express" business, which may be generally described as follows: the collecting at the respective residences or places of business of shippers and receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employees, and at destination personally delivering at the addresses of the respective consignees, packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, certificates of stock and other valuable papers, jewels silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, also parcels of goods, wares and merchandise requiring great dispatch or careful handling, also fruit, vegetables, fresh meats, fish, oysters, fish-spawn and other articles liable to decay or other injury
16 from delay; also live animals requiring particular care and attention during transportation; also receiving and forwarding bills, notes, drafts and accounts, and receiving and returning payment thereof; also receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles and returned to shipper; that this defendant does not own or control any means or instrumentalities of transportation, except the wagons used by it for collecting the goods of shippers at their residences or places of business and transporting the same to the stations or depots of the railroad or steamboat line where they are to be loaded upon the cars or boats, and for the removal of the same at destination from the cars or boats to the residences or places of business of consignees.

That the express business, as thus defined, is and always has been carried on under contracts made by the various express companies

with railroad and other transportation companies, which contracts in general provide for the furnishing by the railroad to the express company of facilities for the transaction of the express business over its lines, the transportation by the railroad company under the personal care of employees of the express company, upon passenger trains, of goods forwarded by the express company, the payment by the express company to the railroad company, as compensation for such facilities and service, of a certain percentage of the gross receipts of the express company derived from the business transported over the line of the railroad, and a covenant by the express company to supply under such contract and efficent express service upon all the lines of the railroad.

Under such contracts the American Express Company is, and for more than fifty years has been, engaged in carrying on the express business upon many lines of railroad, now amounting in the aggregate to some 40,000 miles of railway, including the Boston & Maine Railroad system, the New York Central system, the Chicago & Northwestern Railway, the Illinois Central, the Missouri, Kansas and Texas, and other lines.

That the business thus carried on embraces both local, or
17 domestic, and interstate business, a large part of it consisting of the receiving, forwarding and delivering of packages between points in different States. That for over fifty years it has been the general custom of express companies in this country and was the custom of this defendant to exchange with railroad companies and other carriers, passes for their respective officers, employees and their families, the railroad companies issuing passes for the transportation of such persons and their personal baggage and the express companies issuing passes or franks for the transportation or forwarding of the personal packages of the persons to whom the same were issued, and that for the same length of time it has been the general custom of all express companies, and was the custom of this defendant, to issue to its own officers, agents, attorneys at law, employees and their families, passes or franks for the transportation or forwarding of their personal packages by express. That the passes and franks so issued by this defendant in conformity with said custom applied to no other property or merchandise than the personal parcels of the holder, and in particular did not apply to any shipments of extra heavy weight, money, bonds, jewelry, live-stock or business packages.

That the express companies were first subjected to the provisions of the Interstate Commerce Act by the Act aforesaid of June 29th, 1906, and that upon the taking effect of said Act this defendant duly filed and published the schedules of rates required by the Interstate Commerce Act; that forthwith upon the passage of the said Act this defendant withdrew all outstanding passes issued by it to others than persons belonging to the particular classes hereinafter specified, leaving in force only the following, namely:

a. Passes issued to officials, agents, attorneys at law and employees (and their families) of this Company.

b. To officials and employees (and their families) of railroad companies, express companies and other transportation companies

in exchange for passes for personal transportation and the transportation of personal baggage issued to the officers and employees of the defendant company by such other common carriers.

c. To ministers of religion.

18 and that since the taking effect of the said Act of June 29th, 1906, this defendant has forwarded upon such passes or franks, without demanding or receiving any payment therefor, shipments of personal packages by the holders of such passes or franks, from points within one state of the United States to points within other states of said United States.

And this defendant alleges that it is advised by counsel and verily believes that it was not the intention or effect of the Interstate Commerce Act or the various Acts amendatory thereof to forbid the issuance by express companies of passes or franks to persons of the classes above mentioned, that the issuance of such passes or franks was not within the evils sought to be remedied or corrected by said Acts and that this defendant had full right and authority under said Acts to issue the said passes or franks and to forward from points in one state to points in other states the personal packages of the holders thereof under the provisions of the said Acts.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith *he* is by the said bill charged, without this, that there is any other matter, cause or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges, in this behalf most wrongfully sustained.

AMERICAN EXPRESS CO.,
By LEWIS CASS LEDYARD AND
WINSTON, PAYNE, STRAWN & SHAW,
Its Solicitors.

LAWRENCE MAXWELL,
Of Counsel.

(Endorsed:) Filed Jul. 2, 1907. H. S. Stoddard, Clerk.

19 And on the same day to-wit: the second day of July, 1907, come the parties in said entitled cause by their solicitors and filed in the clerk's office of said Court a certain Stipulation of Facts. Which said Stipulation of Facts together with the exhibits thereto attached is in the words and figures following to-wit:

20 *Stipulation of Facts.*

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Subject to any objection by either party as to competency, materiality or relevancy, it is stipulated for the purposes of this suit that the following facts are true:

The American Express Company is an unincorporated association of individuals, organized under a contract or articles of association or partnership, executed originally in 1850, renewed in 1859, and amended in 1868 upon the occasion of the merger with it of the Merchants Union Express Company, an organization of a similar character, similarly constituted.

A copy of the articles of association and merger of 1868, as amended up to the present time, is hereto annexed, marked Exhibit "A."

The Company has never received any charter or franchise from the State.

Since its formation the Company has continuously engaged in and prosecuted the various forms of business and enterprises set forth in said articles and is still engaged in the prosecution thereof.

Among the forms of business thus carried on by the defendant is that generally known as the "express" business, which may be generally described as follows: The collecting at the respective residences or places of business of shippers, and receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employés, and at destination personally delivering at the ad-

21 dresses of the respective consignees, packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, certificates of stock and other valuable papers, jewels, silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, also parcels of goods, wares and merchandise requiring great despatch or careful handling; also fruit, vegetables, fresh meats, fish, oysters, fish spawn and other articles liable to decay or other injury from delay; also live animals requiring particular care and attention during transportation; also receiving and forwarding bills, notes, drafts and accounts, and receiving and returning payment thereof; also receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles and returned to shipper.

The kinds and classes of property thus forwarded by the express companies, as common carriers for the public generally, include the kinds and classes of property named in the cards, stamps and pasters hereinafter set forth, but do not ordinarily include such articles as, by reason of their bulk or weight, are ordinarily shipped as freight, such as hay, grain, steel rails and the like.

The Company does not own, directly or indirectly, any means or instrumentalities of transportation, except the wagons used by it for collecting the goods of shippers at their residences or places of business and transporting the same to the stations or depots of the railroad or steamboat line where they are to be loaded upon the cars or boats, and for the removal of the same at destination from the cars or boats to the residences or places of business of consignees.

The express business is, and always has been, carried on under contracts made by the express companies with railroad and other transportation companies, which contracts in general provide for the furnishing by the railroad to the express company of facilities for the transaction of the express business over its line, the
21½ transportation by the railroad company, under the personal care of employés of the express company, upon passenger trains (or in some instances upon special trains made up exclusively of cars for express matter) of goods forwarded by the express company, the payment by the express company to the railroad company, as compensation for such facilities and service, of a certain percentage of the gross receipts of the express company derived from the business transported over the line of the railroad, and a covenant by the express company to supply, under such contract, an efficient express service upon all the lines of the railroad.

Under such contracts the American Express Company is, and for many years has been, engaged in carrying on the express business upon many lines of railroad, amounting in the aggregate to some 40,000 miles of road, including the Boston & Maine System, the New York Central System, the Chicago & Northwestern Railway, the Illinois Central, the Missouri, Kansas & Texas, and other lines.

The business thus carried on embraces both local, or domestic, and interstate business. A large part of it consists of the receiving, forwarding and delivering of packages between points in different states.

For many years a custom has existed under which express companies have issued to the officers and employés and their families of the respective railroad companies and other carriers, cards, stamps and pasters of the kinds and substantially in the forms hereinafter set forth, and in return therefor the railroad companies and other carriers have issued to the respective officers and employés and their families of the express companies passes entitling the respective holders thereof to free transportation as passengers over the lines of the carriers issuing them (such free transportation including, in connection therewith and as incidental thereto, the transportation of the passenger's baggage in limited quantities). The express companies have also exchanged with each other cards, stamps and
22 pasters of the kinds hereinafter set forth for their officers and employés and their families. The cards, stamps and

pasters thus issued by the American Express Company were of two general classes, namely, those which continued in force for all shipments coming within their terms during the year for which they were issued, and those which were good only for the particular shipment to which they were attached, the latter being in the form of a stamp or paster to be affixed upon the parcel forwarded.

For many years, also, it has been the custom for express companies to issue to their own officers, agents, attorneys at law, employés and their families, cards, stamps or pasters of both classes above mentioned.

The annual cards so issued by the American Express Company, to wit, those belonging to the first class above mentioned, in conformity with such custom, were in the form hereto annexed, marked Exhibit "B". The stamps or pasters good only for the particular shipment to which they were attached, were in the form hereto annexed marked Exhibits D. and E.

Upon the passage and taking effect of the Act to amend the Interstate Commerce Act, commonly called the Hepburn Act, the American Express Company duly filed schedules of rates mentioned in said Act.

It also issued, through the President's office, the following official instructions to all subordinate officers and employés, dated October 1, 1906:

"*Card Franks and Stamp Passes.*—The present authorized Franks and Passes of the Company, are the Red (Unlimited as to weight) Franks and Passes, and Blue (limited to 20 lbs.) Passes, and Agents must recognize no other form.

Until the Courts or the Interstate Commerce Commission have determined the extent to which the provisions of the Interstate Commerce Law relating to the interstate transportation of property at free or reduced rates are to be applied to such shipments transported by Express Companies, Annual Card Franks or Stamp Passes of this Company covering the free interstate transportation of
23 property over this Company's lines, will be limited to the following:

1. To officials and employés (and their families) of this Company.

2. To officials and employés (and their families) of Railroad Companies, Express Companies and other transportation companies which are authorized, under the law, to exchange Passes with other Common Carriers.

3. To ministers of Religion.

Annual Card Franks for 1906 covering free transportation of interstate shipments issued other than as above have been withdrawn.

Card Franks in the hands of persons entitled thereto, will be recognized for the current year, subject to the following conditions printed thereon, which must be complied with:

"This Company will transport free of charge over its lines in the United States and Canada, the personal parcels of the holder.

"This Frank does not apply to shipments of extra heavy weight,

money, bonds, jewelry, live stock or business packages, and is not transferable.

"The person accepting this Frank assumes all risk of loss or damage to property carried under the same, and expressly agrees that this Company is not to be held liable under any circumstances.

"If charges are collected upon packages which were entitled to free transportation under this Frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

"The holder of this Frank is requested to present the same with shipment when made, or, if not practicable to do so, to mark on face of package "Free Frank No. —," adding his signature.

24 "If used at other than place where holder resides, the Frank must be presented with shipment."

The free transportation of any property for shippers is prohibited."

In its official Circular of January 2, 1907, these instructions were confirmed by the following:

"Until the Courts or the Interstate Commerce Commission have determined the extent to which the provisions of the Interstate Commerce Law relating to the transportation of property at free or reduced rates are to be applied to such shipments transported by Express Companies, Annual Card Franks or Stamp Passes of this Company covering the free transportation of property over this Company's lines, will be limited to the following:

1. To officials and employés (and their families) of this Company.

2. To officials and employés (and their families) of Railroad Companies, Express Companies and other transportation Companies which are authorized, under the law, to exchange Passes with other Common Carriers.

3. To ministers of Religion.

Card Franks and Stamp Passes.—The present authorized Franks and Passes of the Company, are the Red (unlimited as to weight) Franks and Passes, and Blue (limited to 20 lbs.) Passes, and Agents must recognize no other form.

Card Franks for 1906 have expired by limitation, and Agents will discontinue receiving or delivering shipments free thereunder.

Card Franks for 1907 have been issued to persons entitled thereto, and will be recognized for the current year, subject to the following conditions printed thereon, which must be complied with:

25 "This Company will transport free of charge over its lines in the United States and Canada, the personal parcels of the holder.

'This Frank does not apply to shipments of extra heavy weight, money, bonds, jewelry, live stock or business packages, and is not transferable.

'The person accepting this Frank assumes all risk of loss or damage to property carried under the same, and expressly agrees that this Company is not to be held liable under any circumstances.

'If charges are collected upon packages which were entitled to free transportation under this frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

'The holder of this Frank is requested to present the same with

shipment when made, or if not practicable to do so, to mark on face of package 'Free Frank No. —' adding his signature.

'If used at other than place where holder resides, the Frank must be presented with shipment.'

The free transportation of any property for shippers is prohibited."

Ever since the taking effect of the Hepburn Act, the American Express Company has continued to issue cards, stamps and pasters of the forms herein set forth, to the several classes of persons described below, to-wit:

1. To officials, agents, attorneys at law, and employés (and their families) of this Company.

2. To officials and employés (and their families) of Railroad Companies, Express Companies and other transportation companies, in exchange for passes and franks of such other common carriers.

3. To ministers of Religion.

and has transported and forwarded upon such cards, stamps and pasters, without demanding or receiving any payment therefor, shipments of property of the kinds and classes described therein, from points within one state to points within other states.

26–53

Exhibit C, hereto annexed, is an example of the form of the annual cards so issued and used since January 1, 1907.

Exhibits D and E, hereto annexed, are examples of the stamps or pasters so issued and used both before and since the passage of the Hepburn Act.

It is further stipulated that either party hereto may have the right to produce at the hearing such evidence, in addition to the facts above stipulated, and not inconsistent therewith, as it may see fit.

EDWIN W. SIMS, *U. S. Attorney.*
AMERICAN EXPRESS CO.,
By LEWIS CASS LEDYARD AND
WINSTON, PAYNE, STRAWN & SHAW,
Its Solicitors.

LAWRENCE MAXWELL,
Of Counsel.

(Here follow facsimiles of Exhibits B, C, D, and E, marked p. 54.)

* * * * * * *

THIS PAGE BOUND VERTICAL IN BOOK

Exhibit C.

American Express Company

Will transport free of charge over its lines in the United States and Canada during the year 1907 the personal parcels of

No. 2705 [illegible]

Subject to conditions named hereon.

[illegible] President.

This Frank does not apply to shipments of extra heavy weight, money, bonds, jewelry, live stock or business packages and is not transferable.

The person accepting this Frank assumes all risk of loss, or damage to property carried under the same and expressly agrees that this Company is not to be held liable under any circumstances.

If charges are collected upon packages which were entitled to free transportation under this Frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

The holder of this Frank is requested to present the same with shipment when made, or if not practicable to do so, to mark on face of package "Free Frank No." adding his signature.

If used at other than place where holder resides the Frank must be presented with shipment.

Issued by [illegible]

Exhibit B.

American Express Company

Will transport free of charge over its lines in the United States and Canada during the year 1908 the personal parcels of

No. 3742 [illegible]

Subject to conditions named hereon.

[illegible] President.

This Frank does not apply to shipments of extra heavy weight, money, bonds, jewelry, live stock or business packages and is not transferable.

The person accepting this Frank assumes all risk of loss, or damage to property carried under the same and expressly agrees that this Company is not to be held liable under any circumstances.

If charges are collected upon packages which were entitled to free transportation under this Frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

The holder of this Frank is requested to present the same with shipment when made, or if not practicable to do so, to mark on face of package "Free Frank No." adding his signature.

If used at other than place where holder resides the Frank must be presented with shipment.

Issued by [illegible]

Date Issued _____ 190__

To Whom _____

On Account of _____

Addressed to _____

_____

Weight _____ lbs. Charges, if collected, $ _____

AMERICAN EX. CO. No. 14559

(5037, Oct., 1905.)

AMERICAN EXPRESS CO.

AT OWNER'S RISK of loss or damage to the property carried, will

PASS Package addressed

M _____

_____

Countersigned by _____

Stamp void and shipment subject to regular charges if addressed otherwise than as above.

No. 14559

PRESIDENT.

INSTRUCTIONS.

Stamp Passes for use of parties who are entitled to the Company's services free of charge are to be used only for **business forwarded**, and **must not be used in lieu of refused vouchers**, for deduction of such charges on business received.

Each pass and stub of same must, before issue, be properly filled out by Official issuing same. Such Official must ask for what purpose and address the pass is to be used, and must write the address on the face of stamp before it leaves his hands.

Under no circumstances must books of stamps be issued to outside parties for use as occasion requires.

When a new supply of passes is required, the cover and stubs of each book of used stamps must be sent to the Superintendent of the Division furnishing same.

Matter carried under these Passes is subject to the following **terms and conditions, notice of which must be given to the person to whom stamp is issued:**

This Pass does **not** apply to shipments of **EXTRA HEAVY WEIGHT, money, bonds, jewelry, live stock, or business packages,** and is **not transferable.**

The person accepting this Pass assumes all risk of loss or damage to property carried under the same and **expressly agrees that this Company is not to be held liable under any circumstances.**

Passes must not be used for shipments, the weights of which exceed the limit named on face of stamp.

If passes are used upon packages not addressed in accordance with the reading of same, regular charges will be made and collected upon shipment.

Date Issued _____ 190__

To Whom _____

On Account of _____

Addressed to _____

_____

Weight _____ lbs. Charges, if collected, $ _____

AMERICAN EX. CO. No. 246 12 26

(5085, Oct., 1905.)

AMERICAN EXPRESS CO.

AT OWNER'S RISK of loss or damage to the property carried, will

PASS Package not exceeding 20 pounds, addressed

M _____

_____

Countersigned by _____

Stamp void and shipment subject to regular charges if addressed otherwise than as above.

No. 246 12 26

PRESIDENT.

INSTRUCTIONS.

Stamp Passes for use of parties who are entitled to the Company's services free of charge are to be used only for **business forwarded**, and **must not be used in lieu of refund vouchers**, for deduction of such charges on business received.

Each pass and stub of same must, before issue, be properly filled out by Official issuing same. Such Official must ask for what purpose and address the pass is to be used, and must write the address on the face of stamp before it leaves his hands.

Under no circumstances must books of stamps be issued to outside parties for use as occasion requires.

When a new supply of passes is required, the cover and stubs of each book of used stamps must be sent to the Superintendent of the Division furnishing same.

Matter carried under these Passes is subject to the following **terms and conditions, notice of which must be given to the person to whom stamp is issued:**

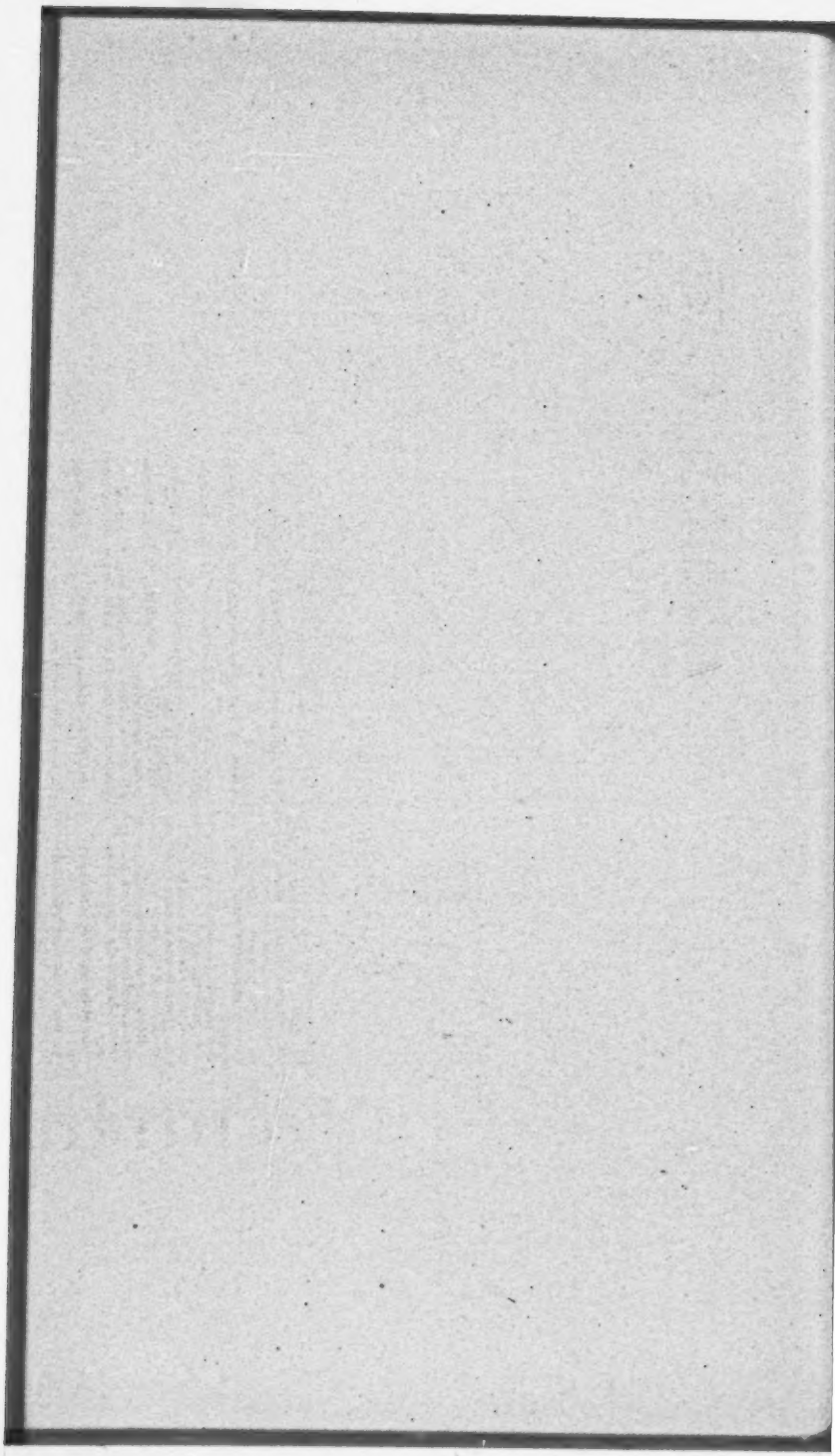
This Pass does **not** apply to shipments of EXTRA HEAVY WEIGHT, **money, bonds, jewelry, live stock, or business packages,** and is **not transferable.**

The person accepting this Pass assumes all risk of loss or **damage** to property carried under the same and **expressly agrees that this Company is not to be held liable under any circumstances.**

Passes must **not be used for shipments, the weights of which exceed the limit named on face of stamp.**

If passes are used upon packages not addressed in accordance with the reading of same, regular charges will be made and collected upon shipment.

THIS PAGE BOUND VERTICAL IN BOOK



54 (Endorsed:) Filed July 2, 1907. H. S. Stoddard, Clerk.

55 And afterwards to-wit: on the third day of July, 1907, come the United States of America by Edwin W. Sims, United States Attorney for the Northern District of Illinois and filed in the Clerk's office of said Court its certain Replication in the words and figures following to-wit:

56 *Replication.*

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 28728.

UNITED STATES OF AMERICA
v.
AMERICAN EXPRESS COMPANY.

Replication.

This replicant, the United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, American Express Company, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed Jul- 3, 1907. H. S. Stoddard, Clerk.

57 And on to-wit: the twenty-fourth day of April, 1908, there was filed in the clerk's office of said Court in said entitled cause a certain Opinion by Judge Kohlsaat, in words and figures following to-wit:

57½ Opinion.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA

v.

UNITED STATES EXPRESS COMPANY; NATIONAL EXPRESS COMPANY; AMERICAN EXPRESS COMPANY; WELLS FARGO AND COMPANY EXPRESS, and ADAMS EXPRESS COMPANY.

On Petitions to Restrain Violations of the Interstate Commerce Law.

On Final Hearing.

(*Syllabus by the Court.*)

1. The Government by this action seeks to restrain the express companies from issuing franks to any officer, agent, attorney, or employee of itself, or other express company, and of any railroad company, and to the respective families of said several persons, and from transporting, without demanding full rate of payment therefor as published, any property of any of said persons from a point in one State to a point in another State. Defendants admit the granting of free transportation substantially as charged, and raise the issue that such practice is not contrary to law. *Held*, That the acts described in the pleadings do not come within the excepted classes, and are therefore in violation of the law.
2. The term "discrimination" in the amended section 1 of the Elkins Act includes unjust discrimination, as that is not within the statute which is not unjust or unfair.
3. The words "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions" as contained in section 2 of the act to regulate commerce relate to the carriage of goods and not to the person or capacity of the sender or receiver.
4. Defendants' contention that gratuitous transportation is not commerce is not tenable. The statute applies to all acts which
58 directly or indirectly affect interstate commerce, and it can not rest in the volition of the carrier by departing from the published schedules in arbitrary cases, to create a privileged class to which it may with impunity extend discriminating rates. There can be no doubt that it is clearly within the power of Congress to legislate upon free transportation in interstate commerce and to include the free carriage of goods by an express company among those acts which are prohibited by the act to regulate commerce.

5. The claim on the part of defendants that the granting of the free carriage set out in the pleadings contributes materially toward making its service attractive to employees, resulting in better transportation facilities to the public, and therefore not within the act, even if true, is beside the question before the court. Whether or not a construction of a statute would work inconvenience or affect the efficiency of the thing legislated upon is of no moment, provided Congress has the power to legislate upon the subject-matter.
6. There is no reason for assuming that Congress intended to give other meaning to the term "pass" than those in common acceptation, and "pass" as used in section 1 of the act as amended does not include the "franks" in question.
7. There is nothing in section 22 of the act to regulate commerce to the effect that Congress intended that the excepted persons and property are not to be considered within the statute. *I. C. C. v. B. & O. R. R. Co.*, 145 U. S., 263, distinguished.
8. Recent amendments to the act to regulate commerce contemplate a more effectual enforcement of that statute. The requirements are made more specific, the prohibitions more emphatic, and greater vitality is infused into the act.

Edwin W. Sims, United States attorney, and *James H. Wilkerson*, special assistant United States attorney, for the United States.

Frank H. Platt and *Winston, Payne, Strawn & Shaw* for United States Express Company.

Lewis Cass Ledyard and *Winston, Payne, Strawn & Shaw* (*Lawrence Maxwell* of counsel) for National Express Company and American Express Company.

W. W. Green and *Holt, Wheeler & Sidley* for Wells, Fargo and Company Express.

Cravath, Henderson & De Gersdorff and *Winston, Payne, Strawn & Shaw* (*Lawrence Maxwell* of counsel) for Adams Express Company.

(April 22, 1908.)

Opinion of the Court.

KOHLSAAT, *Circuit Judge:*

The Government files its petition herein under the provisions of section 3 of "an act to further regulate commerce with foreign nations and among the states," approved February 19, 1903,
59 to restrain defendant from issuing franks to any officer, agent, attorney, or employee of itself, or other express companies, and of any railroad company, and to the respective families of said several persons, and from transporting, without demanding full rate of payment therefor as published, any property of any of said persons from a point in one state to a point in another state.

Defendant has answered and the facts have been stipulated, admitting the granting of free transportation of property substantially

as charged. The issue is squarely made upon the law, and the cause is now before the court on final hearing.

Those portions of the statutes of the United States involved in this proceeding are:

First. That part of section 1 of the Interstate Commerce Act of February 4, 1887, as amended June 29, 1906, which reads as follows:

No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion * * *: *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in the case of general epidemic, pestilence, or other calamitous visitation.

Second. That portion of section 2 of said act of February 4, 1887, which reads as follows:

That if any common carrier subject to the provisions of this act shall * * * collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Third. That part of section 3 of the same act, which reads as follows:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Fourth. That part of section 6 of said act, as amended by the act of June 29, 1906, which reads as follows:

Nor shall any carrier charge or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff.

Fifth. Section 22:

That nothing in this act shall prevent the carriage, storage, or handling of property free, or at reduced rates for the United States, State, or municipal governments. * * *; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees.

Sixth. That part of section 1 of the act of February 19, 1903, known as the Elkins Act, as amended June 29, 1906, which reads as follows:

The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs of rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive, any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

* * * * * * *

Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate, as against such carriers, its officers or agents, or any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Seventh. By the act of June 29, 1906, it was provided:

The term "common carrier" as used in this Act shall include express companies and sleeping-car companies.

It is contended by complainant that said acts of defendant in transporting property for the above persons without charge: First, constitute unjust discrimination under sections 2 and 3 of the act of 1887; second, constitute a charge of less than schedule rates under section 6 of the act of 1887, as amended June 29, 1906; third, violate the Elkins law of 1903, as amended June 29, 1906, in the matter of discrimination and variance from Schedules. (The language of this clause of the Elkins Act last referred to is substantially unchanged by the amendment.)

61 For defendant it is claimed: First, that such acts were concededly lawful prior to the amendment of June 29, 1906;

second, that such acts do not fall within the prohibition of the act as it now stands; third, that said acts do not come within the meaning of "commerce" as used in the act; fourth, that express companies come within the exceptions of the act as amended June 29, 1906.

Prior to the amendment of June 29, 1906, express companies were not specifically subject to the terms of the interstate commerce act and the several amendments thereto as common carriers. Since that date hitherto, they stand with reference to the act and the several amendments thereto as though they had been named in the original act of 1887. They are in no respect in an attitude different from that of a railroad, save in so far as the language of the act necessarily excludes them. It may be conceded for the purposes of this hearing that the acts complained of were lawful prior to the passage of the said amendment of June 29, 1906. Since that amendment, said transactions, so far as they contravene the provisions of said act are unlawful. These may be stated briefly as follows: (1) the provisions of sections 2 and 3 against unjust and unreasonable discrimination in the transportation of persons or property; (2) said amended section 6, prohibiting the taking of any greater or less sum for transportation of passengers or property than that named in the tariffs filed, and (3) said section 1 of the Elkins Act, as amended, making it unlawful to offer or accept any rebate from the published rate, or other discrimination in respect of the transportation of any property whereby any advantage is given.

Amended section 1 of the so-called Elkins Act differs from sections 2 and 3 of the original act, among other matters, in this, that the word "discrimination" is used in the former without any qualifying adjective, as "unjust," etc. It is contended by the Government that this omission discloses the intention of the part of Congress, "to require common carriers in interstate commerce to publish and file schedules of rates, to adhere absolutely to such rates, and to grant no preferences or discriminations unless expressly authorized by the statute." It may be doubted whether Congress intended by this language to broaden the prohibitions of the act in that respect. It is difficult to conceive of the terms, discrimination, prejudice, or disadvantage as not associated with what is unjust, unreasonable, and undue. It is true the adjectives are dwelt upon in the former decisions of the court with considerable emphasis. It hardly seems, however, as though their absence would have modified the opinion rendered in those cases. Webster defines the word "discrimination," with reference to railroads, as "the arbitrary imposition of unequal tariff for substantially the same service," investing it with the sense of unjustness and unfairness.

62 So far as appears, the Supreme Court has not had its attention called to the change, and has given it no construction. In *Platt v. LeCocq*, 150 Fed. Rep., 391, the words "prejudice and disadvantage" of the South Dakota statute were construed to mean unreasonable prejudice or disadvantage. In view of these considerations, and bearing in mind the general trend of the statute and amendments thereof, there seems to be no sufficient basis for the construction of the Elkins Act asked for by the Government in that

respect. It is, however, evident that the passage of the acts of 1903 and 1906 contemplated a more effectual enforcement of the statute. The requirements are made more specific and the prohibitions more emphatic, and, as if to make an end of the violations theretofore winked at, it was declared in 1906 that free transportation of persons except in certain specifically named instances should not be granted after January 1, 1907.

As above said, the Government insists that under these statutes as amended, it is the duty of common carriers to file and publish their tariffs (except as to those instances specifically named in section 22) and having so done, to charge the rate to everyone, including those named in the pleadings; that the "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions," of section 2 "relates to the carriage of goods and not to the person of the sender or consignee" citing *Great Western R. R. Co. v. Sutton*, L. R. 4 H. L., 226, and *Denaby Main Collier Co. v. Manchester Railway Co.*, 11 Appeal Cases, 97. In the latter case, Lord Chief Justice Blackburn said:

I think it finally settled * * * that for passing over the same portion of the railway, the obligation to charge, in respect of goods of the same description, equally, is imposed if they are "under the same circumstances" and that the circumstances are those relating to the carriage of goods and not to the person of the sender.

The portion of sections 2 and 3 which refer to unjust discrimination and undue and unreasonable preference are modeled from the English tariff act and the construction placed thereon by the English courts is deemed, to say the least, very persuasive. *Interstate Commerce Commission v. B. & O. R. R. Co.*, 145 U. S., 263; *Interstate Commerce Commission v. Alabama Midland R. R. Co.*, 168 U. S., 144; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S., 197.

The Interstate Commerce Commission (5 I. C. C. Rep., 69, 77, and 81) has construed section 2 as follows:

Without further citation of authority, the construction we give to section 2 of the act to regulate commerce is that where the service by the carrier subject to the act is "like and contemporaneous" for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in section 22; and that where the traffic is "under substantially similar circumstances and conditions" in other respects, it is not rendered dissimilar within the meaning of the statute by the fact that such passengers hold unlike or, as sometimes termed, unequal official, social, or business positions, or belong to different classes as they ordinarily exist in a community, or are arbitrarily created by the carrier.

63

Therefore, it seems clear that the court should, on the facts of the case, consider the language above quoted from section 2, as referring to the carriage of goods and not as applying to the person or capacity of the sender or receiver. It is further contended for complainant

that the free carriage of property not excepted in section 22, by defendant, for the classes of persons described in the pleadings, while at the same time the filed and published rate for that same service is charged against the general public, constitutes *per se* discrimination within the meaning of the statute. As above stated, the term "discrimination" includes unjust discrimination, and that is not within the statute which is not unjust or unfair. "The spirit as well as the letter of a statute," says the Supreme Court in *Durousseau v. United States*, 6 Cranch., 307, "must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." To the same effect are *The Paquete Habana*, 175 U. S., 677, and *Glover v. United States*, 164 U. S., 294.

Mr. Justice Brown, speaking for the Supreme Court in *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S., 263, affirming the ruling of the lower court (43 Fed., 37), says:

The object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State or municipal governments, etc.

The section stands, with regard to the transportation of property as originally passed, except as it may be deemed to have been modified by the language of amended section 1 of the Elkins Act (1903), and the more stringent requirements of amended section 6, with regard to the filing, publishing of, and adherence to the schedule of rates.

In the group of cases known as the *Express Cases*, 117 U. S., 1, it was held that railroads were not as to express companies common carriers. This was later approved in *Railway Co. v. Voight*, 176 U. S., 498. In *United States v. C. & N. W. Ry. Co.*, 127
64 Fed. Rep., 785, decided in 1904, the circuit court of appeals for the seventh circuit held that the granting of a party rate to theatrical, musical, and other enterprises, and withholding it from the Government for the transportation of soldiers did not come within the prohibition of the act.

In *Northern Pacific Railway Co. v. Adams*, 192 U. S., 440, and in numerous other cases the courts have held that in transporting an employee of another railroad upon a pass, the company did not stand in the attitude of a common carrier for hire to such person. The jurisdiction of Congress to legislate upon the subjects of car equipment and employers' liability was sustained by the Supreme Court in *Johnson v. R. R. Co.*, 196 U. S., 1, and *Howard v. Illinois Central R. R.*, decided January 6, 1908, upon the ground that the subject-matter had reference to commerce. "Manifestly," says the court in

Adair v. U. S., decided January 27, 1908, "any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated."

Relying upon the doctrine of these decisions, defendant takes the position that gratuitous transportation is not commerce because it lacks the essential idea of traffic. The statute is not a police regulation, it says, nor one dealing with questions of public policy and defendant's acts here involved must be held to transgress the statute only in so far as they are inimical to or influencing commerce.

In respect, however, to the classes not connected with trade or commerce in any manner [say its solicitors] with whom the carrier has no dealings in its common and accepted relation to the public, we contend that gratuitous service is not commerce in any sense of the term, and not forbidden either by the letter or the spirit of the interstate commerce act. The circumstances and conditions surrounding such service are so entirely removed from and unlike the conditions upon which the carrier serves the public, that no comparison can be made between the two to support a charge of unjust discrimination or undue preference. (Defendant's brief p. 12.)

It may be as stated that as to persons and matters *in no way connected with trade or commerce,* the granting of gratuitous carriage would not constitute discrimination or undue preference. If, however, the transaction is within the domain of interstate commerce, it can not be said to be in no way connected with commerce.

Speaking for the Supreme Court in the so-called *Employers' Liability Cases,* 207 U. S., 495, 497, it is said by Mr. Justice White:

From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines,
65 carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that anyone who conducts such business be a "common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several States," etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they

engage in interstate commerce and does not alone regulate the business of interstate commerce.

In *New Haven R. R. v. Interstate Commerce Commission,* 200 U. S., 391, the court says:

It can not be challenged that the great purpose of the act to regulate commerce, while seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.

Mr. Justice Day, speaking for the court in *Armour Packing Co. v. United States,* decided March 16, 1908, says:

But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight and that, the published and filed rate, equally known by and available to every shipper.

* * * * * * *

In this act we find punishment by imprisonment abolished and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. * * *

This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered. * * *

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which, or the motive for which, this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

66 In *Hanley v. Kansas City So. Ry. Co.,* 187 U. S., 619, it is said:

The transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

Mr. Justice Harlan, voicing the opinion of the court in *Adair v. U. S.,* decided January 27, 1908, defines commerce as follows, viz:

This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have

been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed every species of "commercial intercourse among the several states, but not to that commerce completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co. v. U. S.*, 193 U. S., 197, and authorities there cited.

"If," says Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1–196, "as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

It thus appears that while Congress takes jurisdiction of the matter of interstate commerce under the provisions of the Constitution pertaining thereto, it, in so doing, draws to itself full power to deal with all questions arising in that field, and among others the right to declare what shall be and what shall not be permitted therein, subject only to other constitutional provisions, and so to determine what matters are comprehended within the spirit of the act. It may, therefore, not be said, as an abstract proposition, that in respect to the classes claimed by defendant not to be connected with trade or commerce in any manner, with whom the carrier has no dealings in its common and accepted relation to the public, to use counsel's phrase, that gratuitous service is not commerce in any sense of the term, and not forbidden, either by the letter or the spirit of the Interstate Commerce Act. The statute applies to all acts which directly or indirectly affect interstate commerce. Surely, it can not rest in the volition of the carrier by departing from the published schedules in arbitrary cases, to create a privileged class to which it may with impunity extend discriminating rates. Defendant's contention in this regard is not tenable.

67 There can be no doubt but that it is clearly within the power of Congress to legislate upon the subject-matter here involved and to include the free carriage of goods by an express company for employees of itself, other express companies, and railroad companies, among those acts which are prohibited by the interstate commerce act. The claim on the part of defendant that the granting of the free carriage set out in the pleadings contributes materially toward making its service attractive to employees, resulting in better transportation facilities to the public, and therefore not within the act, even if true, is beside the question before the court. While the constitutionality of the act is not here attacked, yet the defendant

seems to imply that to construe the statute as asked for in the bill would leave it open to that objection. For the reasons and upon the authorities above set out and others not cited, this is not the law. Whether or not a construction of a statute would work inconvenience or affect the efficiency of the thing legislated upon is of no moment, provided Congress has the power to legislate upon the subject-matter. A court might well charge itself with judicial cognizance of the fact that, carried to its logical result, the use of free carriage as a means for bettering the public service would revive the very evils which the statute was designed to remove.

The court is of the opinion that the transactions set out in the pleadings are within the prohibitions of the statute, and that, unless included within the exceptions thereof, they must be held to violate the same.

It is contended for defendant that the term "passes," as used in said amended section 1 of the act of 1887, includes the franks in question, one form of which reads as follows, viz.

1907.

This frank does not cover charges on foreign S. S. lines or to the U. S. Island Possessions.

Wells, Fargo & Company will transport free of charge during the current year over its express line the personal packages of —— —— subject to conditions indorsed hereon.

The conditions indorsed on the back are as follows:

The free transportation hereby granted is complimentary and not transferable, and is applicable only to personal packages of the holder, not the shipments of extra heavy weight or quantity, money, bonds, jewelry, live stock or business consignments.

By accepting and using this frank, the respondent thereby assumes all risk of loss or damage from whatever cause to property carried under same.

When charges are collected upon packages entitled to free transportation, the company's agent will if requested refund same upon presentation of the frank.

The holder of this frank is requested to present it with shipments, when made, or if not practicable to do so to personally mark on the baggage "free frank No. ——," adding his signature. If used at any other place than the residence of the holder, the frank must be presented with the shipment.

68 While on the merits there may be no just reason why express companies should not have the same liberty in respect to the issuance of free transportation of property that railroads have as to persons, it is evident that this section applies in terms solely to the transportation of particular classes of persons. And there can be no doubt that Congress acted within its powers in so doing. As said in *Gibbons v. Ogden, supra,* with reference to interstate commerce:

As has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects.

Its acts with regard to subject-matters over which it has plenary power, unless done in contravention of the Constitution, become the supreme law of the land, nor does there seem to be any limitation upon its power to deal as it may elect with the questions involved in the statute under consideration, even though such action, if taken by a state, would be prohibited as class legislation under the fourteenth amendment to the Constitution. In *Howard v. Illinois Central Railroad, supra,* it was urged that the statute discriminated in favor of the employee and against the employer, "placing all employers who are common carriers in a disfavored and all their employees in a favored class." "But," says the Court, "without, even for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act, and not the power to Congress to enact it. We say this, since, in testing the constitutionality of the act, we must confine ourselves to the power to pass it, and may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary."

There is no reason for assuming that Congress intended to give other meaning to the terms "pass" and "frank" than those in common acceptation—the one referring only to persons and the other to property, telegrams, and the like. The language of the statute with reference to the filing of and adherence to rates is comprehensive and unequivocal, and, in the absence of the exception of sections 1 and 22, would include the excluded items thereof. By the proviso, certain persons are relieved from the general effect of the act. This is deemed to be the fair meaning thereof, and the rule of construction laid down by Mr. Justice Story in *United States v. Dickson,* 15 Pet., 141–163, is held to apply, viz:

> In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reasons thereof.

and by Mr. Justice Strong in *Savings Bank v. U. S.,* 19 Wall., 227, 235. "It [the proviso] takes out of the operation of the body of the enactment that which otherwise would be within it; it restrains the generality of the provision." It will be seen from the
69 terms of the frank above set out that it opens a wide field for the evasion of the spirit of the act. It is not even limited to the classes named in the pleadings. This hearing, however, is so limited, and no point is made of this last circumstance. It is broad enough in language to admit of a vast free carriage business, and might well become a potent factor in the securing of business advantages without transgressing the other provisions of the act. Indeed there appears to be no legal or ethical grounds for making any presumptions in its favor, as against the letter of the act as amended.

Section 22 in terms takes from the operation of the act the carriage, storage, and handling of property free or at reduced rates for the United States and state and municipal governments, and for charitable purposes, and carriage to and from fairs and expositions for exhibition thereat and the carriage of certain classes of persons

named therein specifically. Admittedly, the service herein objected to is not mentioned. It is argued for defendant that the language, "Nothing in this act shall prevent," etc., and "nothing in this act shall be construed to prohibit," etc., discloses the intention of Congress to make it known that the excepted persons and property were not to be considered within the statute. In *Interstate Commerce Commission v. B. & O. R. R. Co., supra,* it is said by Mr. Justice Brown: "The object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust," and adds:

It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust; in other words, this section is rather illustrative than exclusive. Indeed, many, if not all, of the excepted classes in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination if more favorable terms were extended to them than to ordinary passengers, such, for instance, are property of the United States * * * it does not operate to the prejudice of a single passenger, who can not be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward anyone it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. * * * If these tickets were withdrawn the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing.

As said by counsel for defendant, "the purpose of that statute" (the Elkins Act) "was to prescribe penalties and supply remedies for the better and more effectual enforcement of the interstate commerce act." The amendments of 1906 infuse greater vitality into the act. Furthermore, in the two cases last cited, the transportation was provided in accordance with published rates, and was regarded by the court as a legitimate means to be employed by the carrier
70 & 71 in stimulating the particular kind of carriage embraced within it. There was no deviation from the rates filed with the Interstate Commerce Commission. That Congress might have declared the special party rate illegal, will hardly be controverted. Whether this be so or not, the facts of those cases differ so greatly from those set out in the pleadings herein, and the construction asked to be placed upon them is so at variance with the later decisions of the court and the language of the statute as it now stands, that it is considered that the granting of the free carriage set out in the pleadings, in the manner in which it is granted, is not justified by law, and is in contravention of the statute.

It is undoubtedly true that even in the absence of statutory provision certain free transportation could not be held to be of a discriminatory nature, as, for instance, those persons and that property directly required by the carrier in sustaining its own construction, maintenance, and efficiency. The Interstate Commerce Commission

in a general rule issued October 12, 1906, found in 12 I. C. C. Rep., 11, held as follows:

But the commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing a duty imposed upon, the carrier, nor from giving free carriage over its line to the households and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interest of, the carrier by which he is employed.

Free carriage of persons and property, other than that permitted by the act, and that required solely for the purposes of the carrier and necessary in the performance of its duty to the public is prohibited by the statute. The acts described in the pleadings come within neither of these classes, and are therefore declared to be in violation of the law.

(Endorsed:) Filed April 24, 1908. H. S. Stoddard, Clerk.

72 And on to-wit: the twenty-fourth day of April, 1908, being one of the days of the regular December term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Decree of April 24, 1908.

28728.

UNITED STATES OF AMERICA
vs.
ADAMS EXPRESS COMPANY.

This cause came on to be heard at this Term upon the pleading herein together with the stipulation of facts on file and of record herein and was argued by counsel; and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows, viz:

That said defendants, its agents, attorneys and all other persons acting under its authority, and each of them, be and they are hereby perpetually enjoined from issuing any frank or other document for the free transportation of property to the following persons, to-wit: the officers, agents, attorneys and employés of said defendant and their respective families; the officers and employés of other express companies and their respective families; the officers and employés of any railroad or any other common carrier subject to the Act to regulate commerce and its amendments and their respective families; or to any of said persons; and from transporting and forwarding for said persons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said Interstate Commerce Act and its amendments.

It is further ordered and adjudged that the plaintiff have and

recover from the defendant its costs of suit to be taxed herein,
73 for which let execution issue.

This decree shall extend only to the transportation of property in interstate and foreign commerce as defined in said Act to regulate commerce and the acts amendatory thereof.

For the purpose of enabling the defendant to issue the necessary instructions to its agents and to call in outstanding franks, it is ordered that this decree shall not become effective until May 10, 1908.

74 And on to-wit: the twenty-fourth day of April, 1908, come the defendant in said entitled cause by its solicitors and filed in the clerk's office of said Court its certain petition for appeal and assignment of errors in words and figures following to-wit:

Petition for Appeal and Assignment of Errors.

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Petition for Appeal and Assignment of Errors.

The defendant prays an appeal to the Supreme Court of the United States from the final decree entered herein, and respectfully submits that the court has erred.

1. In holding that the defendant has committed discriminations forbidden by law.

2. In enjoining the defendant from issuing passes or franks to its officers, agents and employés, and members of their families, for their personal packages.

3. In enjoining the defendant from issuing passes or franks for such packages to the officers, agents and employés of other express companies, and railroad and transportation companies subject to the Act to Regulate Commerce, in exchange for their passes.

4. In construing said Act of Congress as forbidding the issue or interchange of franks or passes as aforesaid.

75 5. In enjoining the defendant from carrying the personal packages of its officers, agents and employés, and members of their families, and the officers, agents and employés of other express companies and common carriers subject to said Act, except on payment of the published tariffs therefor.

6. In entering a decree in favor of the complainant.

7. In not dismissing the petition.

The defendant prays the court to suspend the injunction awarded

by the final decree during the pendency of said appeal in the Supreme Court.

LEWIS CASS LEDYARD,
LAWRENCE MAXWELL, JR.,
Counsel for Defendant.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors.

(Endorsed:) Filed April 24, 1908, H. S. Stoddard, Clerk.

76 And on the same day to-wit: the twenty-fourth day of April, 1908, being one of the days of the regular December term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of April 24, 1908, *Allowing Appeal.*

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

The appeal as prayed is allowed and the injunction awarded by the final decree is suspended until December 1, 1908, or the further order of the Supreme Court provided the transcript on appeal is filed in the Supreme Court within thirty days from this date, The penalty of the appeal bond is fixed at one thousand dollars.

77 And on to-wit: the fifth day of May, 1908, come the American Express Company and the American Surety Company of New York and filed in the clerk's office of said Court a certain Appeal Bond in the words and figures following to-wit:

Appeal Bond.

Know all men by these presents, that we, American Express Company, and American Surety Company of New York, are held and firmly bound unto United States of America in the full and just sum of one thousand dollars ($1000) to be paid to the said United States of America, its attorneys, executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this fifth day of May, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said court between the United States of America, complainant, and American Express Company, defendant, a decree was rendered against the said American Express Company and the

said American Express Company having obtained from said Court an order allowing an appeal to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said Court to reverse the decree of the aforesaid suit.

Now, the condition of the above obligation is such, that if the said American Express Company shall prosecute its said ap-
78 peal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

AMERICAN EXPRESS COMPANY,
By L. M. FARGO,
Vice President & Gen. Manager.
AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. F. SPALDING,
Res. Vice President.

[SEAL.] Attest: KINNEY SMITH, *Res. Ass't Sec'y.*

Sealed and delivered in the presence of

—— ——.

O. K.
R. W. CHILDS,
Ass't U. S. Att'y.

Appvd. May 5, 1908.
KOHLSAAT, *J.*

(Endorsed:) Filed May 5, 1908, H. S. Stoddard, Clerk.

79 And on to-wit: the eighteenth day of May, 1908 there was filed in the clerk's office of said Court in said entitled cause a certain stipulation in words and figures following to-wit.

Stipulation.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

It is hereby stipulated that the appeal to the Supreme Court of the United States in the above case was allowed in open Court, and the issuance and service of citation is waived.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed May 18, 1908, H. S. Stoddard, Clerk.

80 NORTHERN DISTRICT OF ILLINOIS, *Eastern Division, ss:*

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said court in the cause entitled United States of America *vs.* American Express Company, as the same appear from the original records and files of said Court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Chicago, in said District, this 18th day of May, 1908.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

H. S. STODDARD, *Clerk.*

81 Supreme Court of the United States.

No. 785, October Term, 1907.

AMERICAN EXPRESS COMPANY, Appellant,
v.
UNITED STATES OF AMERICA.

Notice for the Purpose of Abridging the Printed Record under Rule 10, Clause 9.

The appellant considers the following portions of the record unnecessary for the consideration of the case on the errors which it has assigned, and it therefore proposes to omit the same in printing the record, to-wit:

Exhibit A, pages 27 to 53, inclusive of the transcript, being the Articles of Association and By-laws of the appellant.

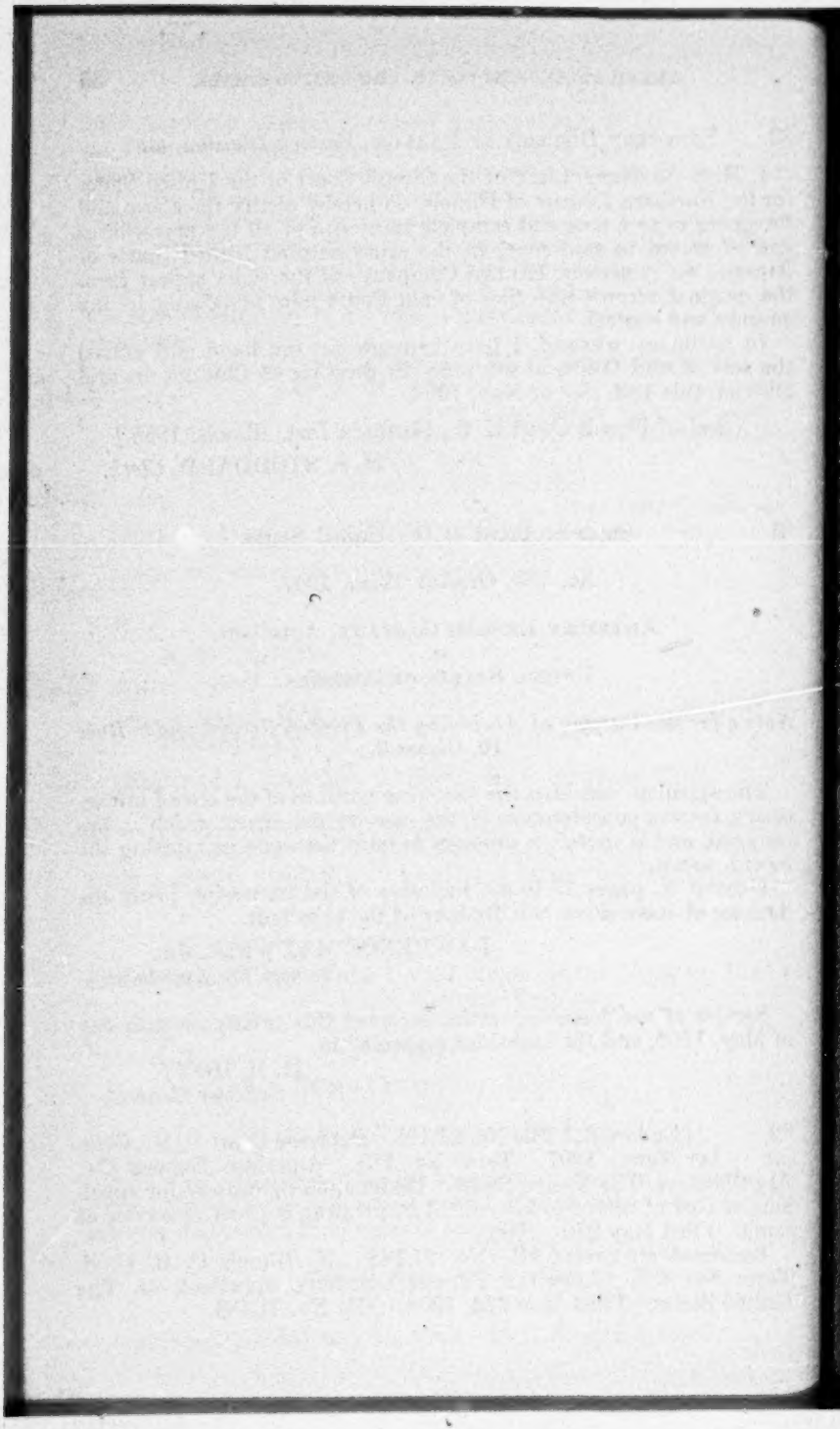
LAWRENCE MAXWELL, JR.,
Counsel for Appellant.

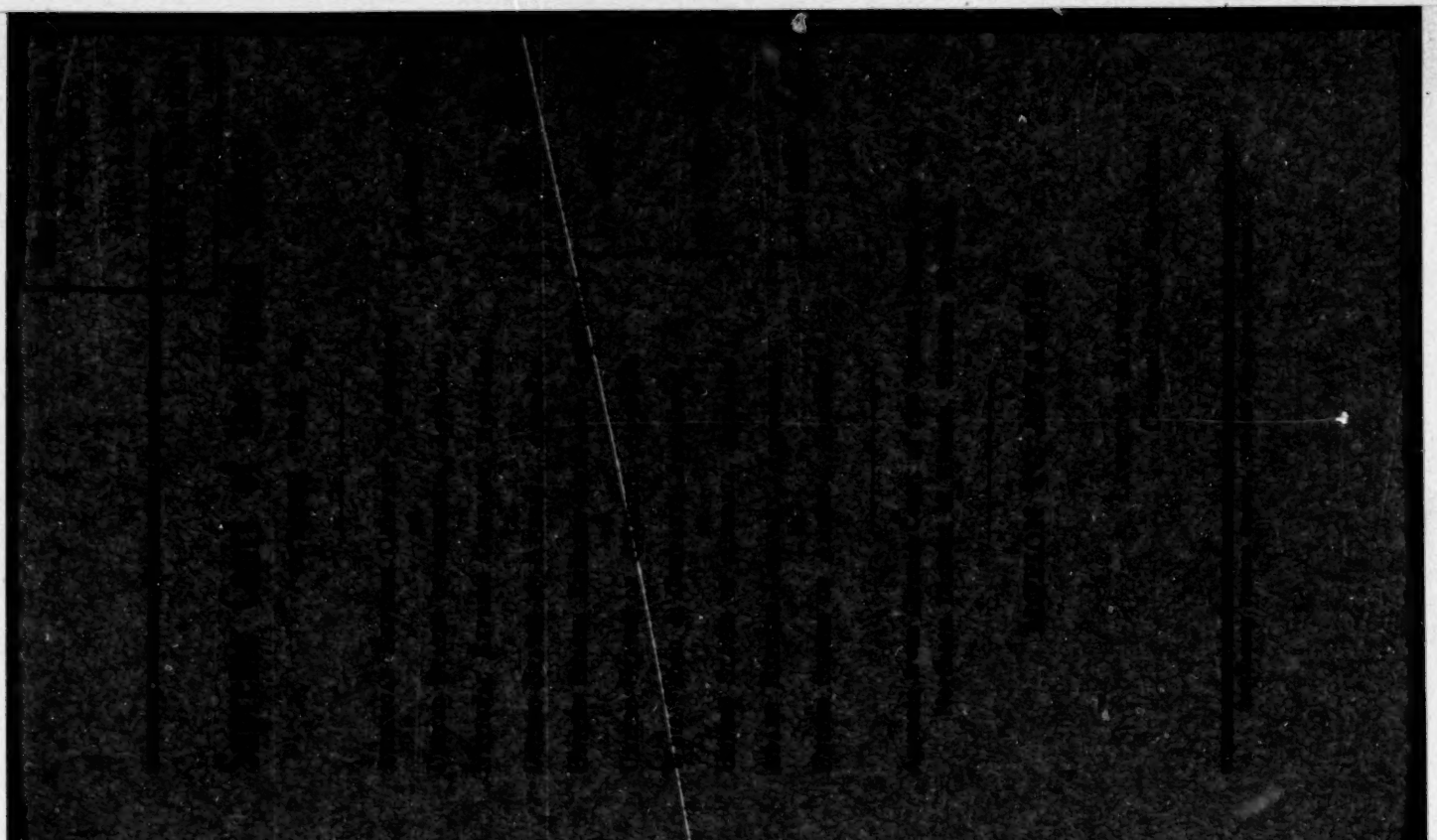
Service of the foregoing notice accepted this twenty seventh day of May, 1908, and the omissions consented to.

H. M. HOYT,
Solicitor General.

82 [Endorsed:] File No. 21,188. Supreme Court U. S. October Term, 1907. Term No. 785. American Express Co., Appellant, *vs.* The United States. Designation by counsel for appellant of part of record to be omitted in printing & proof of service of same. Filed May 27th, 1908.

Endorsed on cover: File No. 21,188. N. Illinois C. C. U. S. Term No. 405. American Express Company, appellant, *vs.* The United States. Filed May 22d, 1908. File No. 21,188.





Supreme Court of the United States.

OCTOBER TERM, 1907.

AMERICAN EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 785.*
NATIONAL EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 786.*
UNITED STATES EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 787.*
WELL FARGO & COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 788.*
ADAMS EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 789.*

Appeals from Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

MOTION TO ADVANCE.

The appellants move to advance the above entitled cases, and to assign them for hearing as one case on as early a day in the next term as may be convenient to the court.

They are suits brought by the Attorney General to enjoin the appellants from issuing express franks to their officers and employes, and members of their families, or to the

officers and employes of other express companies and transportation companies, in exchange for their passes, on the ground that such free transportation is forbidden by the Interstate Commerce Act, as amended June 29, 1906, and by the Elkins Act.

The circuit court, by its final decrees, enjoined the defendants as prayed, but in allowing appeals to this court suspended the operation of the injunctions until December 1, 1908. In view of the limit thus placed upon the orders of suspension, and of the importance of the questions involved, not only to all express companies but to all railroad companies, it is important that the cases be disposed of in this court as early as may be.

This motion is made with the approval of the Solicitor General and in response to the following telegram from him to the United States Attorney who had charge of the cases in the circuit court, viz:

"Please advise counsel for the Express Companies that the Government will consent to an advancement of the case in the Supreme Court for early hearing next term. The motion should be made next Monday, June 1st. Direct counsel's attention to the fact that the operation of the injunction has been suspended by Judge Kohlsaat until December 1st, and that unless they make a motion to advance this case the Government will not consent to a further suspension of the operation of the injunction."

LAWRENCE MAXWELL, Jr.,
Counsel for the Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

AMERICAN EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 405.

NATIONAL EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 406.

UNITED STATES EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 407.

WELLS, FARGO & COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 408.

ADAMS EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 409.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

These cases were instituted in accordance with the provisions of section 3 of the Elkins Act of February 19, 1903, providing for the presentation of petitions

57425—08——1

to the United States Circuit Court to enforce the observance of tariffs published by common carriers in accordance with the interstate commerce act and its amendments and to compel the discontinuance of departures from tariffs and discriminations forbidden by law. They are before this court pursuant to the provision in the section above referred to making applicable to cases of this nature the provisions of the expediting act of February 11, 1903.

The section under which these proceedings are instituted provides in substance that where there is reasonable ground for belief "that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law" a petition may be filed in the Circuit Court of the United States, sitting in equity, having jurisdiction; that thereupon it shall be the duty of the court to inquire summarily into the circumstances upon such notice, and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity; that upon being satisfied of the truth of the allegations, the court shall enforce an observance of the published tariffs and require a discontinuance of the discriminations by proper orders. It is further made the duty of the several district attorneys, under the direction of the Attorney-General, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings.

There is no controversy with reference to the facts involved in these cases. Each of the petitions alleges in substance that the respondent is an express company engaged in the transportation of property in interstate commerce, and is subject to the provisions of the interstate commerce act and the amendments thereto; that since the passage of the amendatory act of June 29, 1906 (the Hepburn Act), making express companies subject to the provisions of the interstate commerce law, each of the respondents pursuant to law has kept open for public inspection its printed tariffs and schedules showing the rates and charges for the transportation of property in interstate commerce, which have been established and which are in force upon its routes, and has duly filed copies of such schedules with the Interstate Commerce Commission; that since the taking effect of the amendatory act of June 29, 1906, each of the respondents, contrary to the published and filed schedules and in violation of the provisions of the interstate commerce laws, has granted the free transportation of property to:

(*a*) The officers, agents, attorneys at law, and employees (and the families of each) of said respective express companies;

(*b*) The officers and employees (and the families of each) of other express companies, and

(*c*) The officers and employees (and the families of each) of various railroads and other transportation companies.

It is further averred that the method employed by the express companies in granting this free transportation is to issue what is commonly known as a "frank," purporting on its face to entitle the holder thereof to the free transportation of property by the company issuing the same. Upon the presentation of this frank the holder is granted the free transportation of his property, in accordance with the terms of the frank. It is charged in substance that the issuing of these franks and the granting of free transportation thereunder by the express companies is a violation of a number of the provisions of the interstate commerce law; that the express companies are continuing to issue them and have announced their intention of doing so in the future, unless they are enjoined by the courts.

In the answers of each of the respondents, except that of the United States Express Company, it is admitted that these companies are common carriers subject to the provisions of the interstate commerce acts. The United States Express Company denies that it is a common carrier subject to the provisions of those acts, but upon the hearing in the lower court it was expressly stated by counsel for that respondent that this question was not to be argued and would not be pressed, and the point is waived in this court. The answers admit in substance the granting of free transportation to the classes of persons described in the petitions, and assert that what the express companies have been doing and are doing in this respect

constitutes no violation of the interstate commerce acts.

In each of the cases there was filed a stipulation of facts upon which, in connection with the pleadings, the case was heard. These stipulations describe somewhat in detail the nature of the express business in which the respective companies are engaged. It is admitted that a large portion of this express business consists in the receiving, forwarding, and delivering of packages between points in different States. The stipulations state that for many years prior to the passage of the law of June 29, 1906, a custom existed under which the express companies which are parties to this suit issued to the officers and employees, and their families, of the respective railroad companies and other carriers, cards, stamps, and pasters substantially in the form set out in the stipulation, and in return therefor the railroad companies and other carriers have issued to the respective officers and employees, and their families, of the express companies passes entitling the respective holders thereof to free transportation as passengers over the lines of the common carriers issuing them (such free transportation including in connection therewith and as incidental thereto the transportation of the passenger's baggage in limited quantities); that these express companies under this custom also exchanged with each other cards, stamps, and pasters of the same kind for their officers and employees, and their families; that it has also been the custom for these express companies to issue to their own officers,

agents, attorneys at law, employees, and their families cards, stamps, and pasters of the kind named.

The stipulations further state that upon taking effect of the act of June 29, 1906, the express companies, pursuant to the provisions of the act, duly issued and filed their schedules of rates for the transportation of property in interstate commerce. The stipulations also set forth that upon the going into effect of the act of June 29, 1906, the respective companies discontinued the issuance of free transportation except to the classes of persons above named, and issued circulars notifying their officers, agents, and employees of that fact. In the stipulation are set out copies of cards, stamps, and pasters of the different forms which the express companies are issuing and upon which they claim the right to grant the free transportation of property. It will be sufficient, for the purpose of illustration, to call attention to one of these forms. One of the forms issued by Wells, Fargo & Company is as follows:

"1907

"This frank does not cover charges on foreign S. S. lines or to the U. S. island possessions.

Wells, Fargo & Company will transport free of charge during the current year over its express line the personal packages of ———, subject to conditions endorsed hereon."

The conditions endorsed on the back are as follows:

"The free transportation hereby granted is complimentary and not transferable, and is

applicable only to personal packages of the holder, not the shipments of extra heavy weight or quantity, money, bonds, jewelry, live stock, or business consignments.

"By accepting and using this frank the respondent thereby assumes all risk of loss or damage from whatever cause to property carried under same.

"When charges are collected upon packages entitled to free transportation, the company's agent will, if requested, refund same upon presentation of the frank.

"The holder of this frank is requested to present it with shipments, when made, or if not practicable to do so to personally mark on the baggage, 'Free frank No. ——,' adding his signature. If used at any other place than the residence of the holder, the frank must be presented with the shipment."

It will be seen, therefore, that the issues are clearly drawn. Appellants do not question the jurisdiction of the court, or the propriety of the proceedings in the manner in which they have been instituted. They admit the validity of the provisions of the interstate commerce laws, and concede that they are subject to those provisions. They admit that they have put in force and published and filed, pursuant to law, their schedules in which they have fixed their rates for the transportation of property in interstate commerce, and assert that the granting of free transportation to the classes of persons mentioned in the pleadings constitutes no unlawful departure from those schedules within the meaning of the interstate com-

merce acts. The appellants concede the granting of the free transportation as charged in the petitions and insist that they intend to continue to grant this free transportation and to issue the documents entitling the respective holders to such free transportation, and claim that their acts in so doing are perfectly lawful.

The questions presented for determination, therefore, are:

First. May an express company which has established, published, and filed its schedules of rates for the transportation of property in interstate commerce issue or give free transportation for property to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law?

Second. May an express company having so established, published, and filed its schedules of rates grant transportation to the officers, agents, and employees, and their families of other express companies when the only consideration for such transportation is the receipt from those express companies of franks issued to its own officers, agents, and employees, and their families, entitling them to the free transportation of their property by the companies with whom there has been this exchange of franks, there being no definite arrangement as to the number of franks so exchanged or the quantity of property to be transported by the respective companies?

Third. May an express company having so established, published, and filed its schedules of rates

grant to the officers, agents, and employees, and their families, of railroad companies and other common carriers the transportation of their property when the only consideration for such transportation is the issuing by such railroad companies or other common carriers of passes to the officers, agents, and employees, and their families, of the express company entitling the holders thereof to the privilege of free travel over the line of the railroad company or other carrier issuing the pass, there being no agreement as to the number of franks or passes to be issued under the agreement or as to the amount of free transportation on the one hand and free travel on the other?

We understand counsel for the respondents to make two principal contentions in justification of the acts complained of by the United States. They contend, in the first place, that the free transportation of property by them under these franks was a perfectly lawful act on their part prior to the enactment of the amendatory law of June 29, 1906; that it does not fall within the scope of any of the positive prohibitions of the act as then amended, and therefore is lawful without regard to the provision of section 1 of the act relating to the issuing of passes.

They contend, in the second place, that even if the issuing of these franks were held to be a violation of some of the prohibitions of the interstate commerce law, the express companies come within the exceptions specified in the first section of the act of

June 29, 1906, with reference to the granting of passes, and have the right to issue the franks in question to the classes of persons covered by those exceptions.

On the other hand, it is the position of the United States that the granting of these franks and the transportation of property by the express companies thereunder constitutes a violation of several of the provisions of the interstate commerce act. It is claimed that in issuing these franks and that in transporting property under them the express companies are guilty of unjust discrimination within the meaning of section 2 of the act, and that they subject other shippers of property over their respective routes to undue and unreasonable prejudice and disadvantage within the meaning of section 3 of the act. It is claimed that the acts on the part of the express companies which are complained of constitute violations of section 6 of the act which provides for the establishment by carriers of schedules of rates to be charged in interstate commerce, and for the filing and publication of those schedules, and which strictly prohibits the carrier in all cases from charging a less compensation than that named in the published and filed schedules.

It is claimed by the United States that the express companies which grant these franks and transport property thereunder violate those provisions of the act of February 19, 1903 (the Elkins law), as amended June 29, 1906, which prohibit generally and in absolute terms common carriers subject to the provisions

of the act from granting any concession or discrimination whereby any property is transported in interstate commerce by any carrier subject to the provisions of the act at less than the rate named in the tariffs published and filed by such carrier or *from giving any other advantage or discrimination.*

It is further claimed by the United States that the granting of this free transportation of property which falls so clearly within the prohibitions of the interstate commerce law is not included within the exceptions in section 1 of the act as amended June 29, 1906; that those exceptions relate only to the transportation of persons and have no reference to the transportation of property, and that therefore no justification can be found for the issuing of these franks by the express companies and the transportation of property thereunder.

I.

The transportation by the express companies of property under franks as disclosed in these cases constitutes an unjust discrimination and subjects other shippers to an unreasonable prejudice within the meaning of sections 2 and 3 of the interstate commerce act.

Section 2 (24 Stat., 379) of the interstate commerce act provides:

> That if any common carrier subject to the provisions of this act shall * * * collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act than it charges, demands,

> collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3 (24 Stat., 379, 380) provides:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The term "under substantially similar circumstances and conditions" refers to the circumstances and conditions relating to the carriage of the goods and not to the person of the sender. Where the traffic is "under substantially similar circumstances and conditions" in other respects, it can not be made dissimilar within the meaning of the statute by the fact that the shipper in one case is a different person from that in another. The Interstate Commerce Commission has placed upon section 2 the following constructions:

> Without further citation of authority, the construction we give to section 2 of the act to

> regulate commerce is that where the service by the carrier subject to the act is "like and contemporaneous" for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in section 22; and that where the traffic is "under substantially similar circumstances and conditions" in other respects, it is not rendered dissimilar within the meaning of the statute by the fact that such passengers hold unlike or, as sometimes termed, unequal official, social, or business positions, or belong to different classes as they ordinarily exist in a community, or are arbitrarily created by the carrier. (*In re Persons Free or at Reduced Rates by B. & M. R. R. Co.*, 5 Interstate Commerce Commission Reports, 69, 77, 81.)

See also *Harvey* v. *Louisville & Nashville Railroad Company* (5 Interstate Commerce Commission Reports, 153.)

In harmony with the view taken by the Interstate Commerce Commission, the Federal courts which have been called upon to pass on the question have held that the granting of free transportation constitutes an unjust discrimination and an unreasonable preference under the provisions of sections 2 and 3 of the interstate commerce act. Thus in *Ex parte Koehler* (31 Fed. Rep., 315, 321–322) Judge Deady, giving instructions to a receiver with reference to the issuing of free transportation, held that the effect

of the interstate commerce act was to prohibit the granting of free transportation except as provided in section 22 of the act. He said:

> The exception (in section 22) takes the subject of free carriage on account of any person's employment by a railway corporation out of the question of "similar circumstances and conditions" as provided in section 2, and declares that the person so employed may be carried on that account, without reference to any other circumstance or condition, and by a necessary implication no one else.

In his charge to the grand jury (66 Fed. Rep., 146, 148) Judge Morrow, interpreting sections 2 and 3 in their relation to section 22 of the interstate-commerce act and referring to the decisions of the Interstate Commerce Commission above cited, held "that the issuing of passes entitling the holder to free transportation from one State to another is, unless justified by the exceptions (in section 22), an 'unjust discrimination' which Congress intended to prevent and punish."

There is nothing in this view inconsistent with the rulings in *Interstate Commerce Commission* v. *Baltimore, etc., R. Co.*, 145 U. S., 263 (the party rate case).

In that case the holding was that the transportation of a number of persons on a single ticket was not substantially identical with the transportation of one person, and that therefore the transportation could not be said to be conducted under circumstances and conditions which were necessarily similar. It is to be observed, however, that the circumstances in

question were those relating to the nature of the carriage and not to any difference in the persons transported.

The portions of sections 2 and 3 of the interstate commerce act relating to unjust discrimination and unreasonable disadvantage were modeled from the English tariff act, and in construing them our courts have followed the interpretation of the English courts.

> *Interstate Commerce Commission* v. *Baltimore, etc., R. Co.*, 145 U. S., 263.
>
> *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S., 144.
>
> *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 197.

Construing similar sections of the English act, the English courts have held with great unanimity that the differences in circumstances and conditions are those relating to the carriage of goods and the nature and character of the service rendered by the shipper, not to the business motive of either the shipper or carrier.

> *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L., 226.
>
> *Denaby Main Colliery Co.* v. *Manchester Railway Co.*, 11 Appeal Cases, 97.

In the latter case Lord Chief Justice Blackburn said:

> I think it finally settled * * * that for passing over the same portion of the railway, the obligation to charge, in respect of goods

> of the same description, equally, is imposed if they are "under the same circumstances" and *that the circumstances are those relating to the carriage of goods and not to the person of the sender.*

Other English cases to the same effect are collected in the opinion of the Interstate Commerce Commission, *In re Boston & Maine R. R. Co.* (5 Interstate Commerce Commission Reports, 69, 79).

True it is that whether or not in a particular instance there is unjust discrimination or unreasonable preference is a question of fact depending upon the matters proved in each case. (*Interstate Commerce Commission* v. *B. and O. R. R. Co.*, 145 U. S., 263; *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S., 144, 170; *Denaby Main Colliery Co.* v. *Manchester R. Co.*, *supra*.) However, the granting of free transportation to any person or class of persons when the public generally is charged a given fixed rate for the same service is of itself sufficient under the above rulings to justify a finding of unjust discrimination and unreasonable preference. It appears absolutely from the facts as stipulated in this case that the express companies are giving free service to the classes of persons described in the pleadings and are charging the general public a fixed rate which they have duly published and filed for precisely the same service. The difference in circumstances upon which the express companies rely as a justification for the discrimination is a difference

which does not go to the nature of the service rendered, but which involves the personality of the shipper only. This is the kind of discrimination which can not be justified under the sections in question, and proof that such discriminations have been granted without any difference in circumstances relating to the kind of carriage or the nature of the service rendered must lead to the finding that the discrimination is unjust and unreasonable.

To appreciate fully the force of this, it is only necessary to consider that the express companies claim the right to transport a package free for one person and to charge another the established rate for the same service, the only difference being that one of the persons happens to be a member of the family of an officer of a railroad company. The trial judge, therefore, under the admitted facts, was bound to hold that the discriminations which it was conceded were being granted were unjust and unreasonable discriminations within the meaning of the statute.

II.

The transportation of property by the express companies under franks constitutes an unlawful departure from their published and filed schedules of rates.

The provisions of the interstate commerce act require absolute and uniform adherence to the schedules of rates published and filed pursuant to the provisions of the law. Section 6 as amended by the act of June 29, 1906, after providing for

publishing and filing schedules, further provides (34 Stat. 584, 587):

> Nor shall any carrier charge or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs.

Section 1 of the Elkins Act, as amended by the act of June 29, 1906, provides among other things as follows (p. 587):

> The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.
> * * *
>
> Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof,

> or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

The requirements of these provisions are absolute. When a carrier has once established a rate pursuant to the interstate commerce act, and has published and filed it, there must be no departure from that rate in favor of any shipper.

> *Texas & Pacific Railway Co.* v. *Mugg*, 202 U. S., 242.
>
> *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, 445.
>
> *Armour Packing Company* v. *U. S.*, 209 U. S., 56.

It is conceded in the cases at bar that the express companies have published and filed their schedules prescribing the uniform rates to be charged for the services rendered by them. Notwithstanding this, however, they maintain the right to depart from those schedules to the extent of granting free transportation to their own officers and employees and to the officers and employees of other carriers in exchange for like favors from those carriers. It is obvious that this is a violation of the plain provisions of the sections of the act above quoted. Any other conclusion is impossible under the opinions of the Supreme Court above cited, which hold that the

rates fixed in the schedules filed pursuant to the act to regulate commerce are controlling, that it is beyond the power of the carrier to depart from such rates in favor of *any* shipper, and that there is no provision excepting special contracts from the operation of the law.

III.

The granting of free transportation of property by the express companies under franks is a violation of the provision in section 1 of the Elkins Act as amended June 29, 1906, which prohibits absolutely all discriminations with respect to the transportation of property in interstate commerce by carriers subject to the act.

We have shown above that the transportation of property under these express franks constitutes an unjust discrimination within the meaning of sections 2 and 3 of the original interstate commerce act. Independent of that, however, this free transportation of property unquestionably constitutes a violation of the provision in section 1 of the Elkins Act as amended June 29, 1906, which provides (34 Stat., 584, 587):

> It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in

> the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

It is to be observed that the prohibition of this act is directed not at *unjust* discriminations or *unreasonable* advantages, but at discriminations and advantages of *every* kind. In the enactment of the amendatory legislation, of which the provision just above quoted is a portion, it was obviously the intention of Congress to require common carriers engaged in interstate commerce to publish and file their schedules of rates, to adhere absolutely to those schedules, and to grant no preferences or discriminations unless such preferences or discriminations were permitted by some express exception in the act. That this is the correct interpretation to be placed upon the provision in question is manifest from the difference in the language used by Congress in the original act of 1887 and in the amendatory legislation. In the original act the discriminations prohibited were unjust discriminations. The prejudices and disadvantages forbidden were undue and unreasonable prejudices and disadvantages. In the amendatory legislation the terms "unjust," "undue," and "unreasonable" are omitted and the prohibition is leveled, in general terms, against any advantage or discrimination. We can not regard this change in language as accidental. Congress was intentionally broadening the scope of the prohibitions against

the granting of advantages and discriminations with respect to the transportation of the property by common carriers subject to the act.

And the correctness of this view is conclusively established when we take into consideration the history of the interstate commerce legislation, the history of the times of which that legislation was a part, the evil which the amendatory legislation was designed to remedy, and the object which Congress had in mind in the enactment of the amendments of 1903 and 1906. Statutes like this must be interpreted in the light of the history of the legislation and the purpose of Congress.

Holy Trinity Church v. *U. S.*, 143 U. S., 457, 463.

Buttfield v. *Stranahan*, 192 U. S., 470, 475.

The original law of 1887 was passed in response to an overwhelming demand of the people that favoritism in the matter of railroad rates should end. Inequality of treatment on the part of the railroads in the matter of rates had produced evils so gigantic that the industrial stability and prosperity of the country were threatened. By reason of the power of the railroad companies to grant favors in transportation, the business of every merchant, manufacturer, and, indeed, of every community was at the mercy of the whim of some railroad manager. The legislation, however, as first enacted in 1887 was far from satisfactory. The discriminations which were prohibited were unjust discriminations; the advantages which could not be given were unreasonable advantages;

and, as a result of the juggling with these words, the force of the statute was "frittered away by niceties at war with the practical administration of justice." It was impossible to indict and convict a carrier for doing something unjust and unreasonable, when the carrier was to be the judge in the first instance of what was, in fact, unjust and unreasonable. The result was that the law in many of its practical features became a mere sham. Rebates, discriminations, and preferences were granted on every hand, sometimes through subterfuge and sometimes in open defiance of the law.

Then came a popular demand, stronger than it had been in the first instance, that the law should be amended and strengthened so as to put an end to these pernicious practices, which had been the foundation of many of the largest and most offensive monopolies, and which were again threatening the business stability of the nation. It was in furtherance of this great object that the amendatory legislation of 1903 and 1906 was passed. If we study the history of the times and the history of this legislation in Congress, there can be no doubt as to what Congress intended to accomplish. An end was to be put to legal jugglery with the words "unjust," "undue," and "unreasonable." Discriminations and advantages of every kind were to be prohibited except as those discriminations and advantages were covered by some specific exception of the law. Common carriers were to put down on paper the rates to be charged for their services in interstate commerce. Those schedules were to

be kept open to the public and were to be filed with the Interstate Commerce Commission; and once so established and filed there was to be no departure from them. The carrier was to be required to collect from every shipper the full amount of the rate as set down in the schedule for the service rendered. There was to be no opportunity left for evading the law through the subterfuge of some service rendered by the shipper to the carrier or of an exchange of services between carriers. The transportation was not to be paid for in something of uncertain value, like contracts for services, for soliciting, or for advertising. The rate was to be paid in money in accordance with the established schedule. Nothing was to be taken in exchange for transportation except that set down in the published and filed schedules. *Discriminations of all kinds were prohibited, except those falling within some specific exception in the act.*

The rules governing the interpretation to be placed upon the Elkins Act have been clearly and forcibly stated by this court in the case of *Armour Packing Co.* v. *U. S.* (209 U. S., 56, 71), as follows:

> The act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. * * *
>
> This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.
>
> The views of this court, speaking through

Mr. Justice White, in *N. Y., New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, 391, are apposite here:

"It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer.'

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required

by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

Again in the same case (page 80), the court said:

* * * one rate (is) to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

* * * There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

* * * the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

If the contention is true that the prohibition in the Elkins Act is directed at discriminations of all kinds, then a common carrier subject to the provisions of the interstate commerce act must, with respect to the transportation of property, charge to everybody absolutely the same rate for the same service, unless in some other section of the act there can be found an exemption which justifies the granting of the discrimination. The only section of the interstate commerce act which relates in terms to the carriage of property at free or reduced rates is section 22, as follows (25 stat. 857, 862):

> That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of soldiers' and sailors' orphan Homes, including those about to enter and those returning home after discharge under ar-

> rangements with the boards of managers of said Homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees.

The first part of the section above quoted refers to the transportation of property; the last portion of it expressly covers the transportation of persons. There is nothing in it which by any possible construction can be taken as covering the granting and interchanging of franks by the express companies charged in these cases.

It is true that the learned circuit judge, in interpreting the sections of the statute involved in this case, was unwilling to construe the terms "advantage" and "discrimination," as used in section 1 of the Elkins Act, to mean anything different from the terms "undue or unreasonable advantage" and "unjust discrimination," as used in sections 2 and 3 of the original interstate commerce act. He decided the case precisely as if the language of the Elkins Act had remained the same as the language of the original act, and held that the discriminations shown to have been committed by the appellants were in fact unjust discriminations. We respectfully submit, however, that in the application of the Elkins Act it is proper to recognize the obvious purpose of Congress to broaden the scope of the original interstate commerce

act. As we have pointed out before, this court in the Armour Packing Company case has stated in clear and unmistakable terms that the purpose of the Elkins Act was to require absolute adherence to established schedule and to prevent all kinds of discriminations not specifically covered by an express exception. It is a rule of statutory construction, where the legislative body has with apparent intention made such a change in the language used, that due significance must be given to the change in the application of the statute. "We are not at liberty," said Mr. Justice Strong in *Market Co.* v. *Hoffman* (101 U. S., 113, 115), "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times."

A few of the cases in which this elementary rule is stated and applied are as follows:

Rhodes v. *Iowa*, 170 U. S., 412, 423;
Mercantile Bank v. *New York*, 121 U. S., 138, 155;
Early v. *Doe*, 16 Howard (U. S.), 610, 616;
Allen v. *Louisiana*, 103 U. S., 80, 85;
Caha v. *U. S.*, 152 U. S., 211, 214;
U. S. v. *Stowell*, 133 U. S., 1, 13;

Heydenfeldt v. *Daney Gold, etc., Co.*, 93 U. S., 634, 640;

Postmaster General v. *Early*, 12 Wheaton (U. S.), 135, 148.

The terms "undue discrimination" and "undue or unreasonable preference or advantage," used in the original interstate commerce act, have been before Congress for consideration many times. One of the most serious defects in the law grew out of the fact that criminal prosecutions could not be based successfully upon statutes defining with such uncertainty the offense prohibited. Thus, in the cases of *C. & N. W. Railway* v. *Dey et. al*, 35 Fed. Rep., 866, 876, and *Tozer* v. *U. S.*, 52 Fed. Rep., 917, 919, Mr. Justice Brewer had held that a criminal prosecution could not be maintained under the sections of the act forbidding the charging of "unreasonable" rates or the giving of "undue" preferences. He said:

> In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable.

When it came to the passage of the Elkins Act, Congress undoubtedly had in mind these decisions of the courts which were an essential part of the history of the legislation in question, and so when Congress came to draw the provision requiring adherence to established rates and prohibiting the giving of advantages and discriminations, the words "undue," "unjust," and "unreasonable" were omit-

ted. We can not consider this fact in connection with the history of the times and the history of the particular legislation and apply the rule of statutory construction applied by this court in so many cases, to which we have above referred, without holding that the word "discrimination," as used in the Elkins Act, covers discriminations of every kind, and that in a proceeding against a carrier for granting a discrimination it is not necessary for the Government to show as a part of its case that the discrimination was an unjust one. To place any such construction upon the Elkins Act is to leave the law substantially as it was prior to the passage of that act and to deny that its obvious purpose and effect was, as pointed out by this court in the case of *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (204 U. S., 426, 447), to *strengthen and make more effective the provisions of the original act.*

The case of *Interstate Commerce Commission* v. *B. & O. R. R. Co.* (145 U. S., 263, 278), referred to by the learned circuit judge in his opinion in this case, only tends to strengthen the force of our position with respect to this proposition. In that case, construing sections 2 and 3 of the original act, and referring to the terms "unjust discrimination" and "undue or unreasonable preference or advantage," Mr. Justice Brown said:

> It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words,

> this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination if more favorable terms were extended to them than to ordinary passengers.

In other words, the original statute prohibiting discriminations was so drawn as to leave for determination as a question of fact in every case whether or not the discrimination was an unjust one. The Supreme Court had said that section 22 did not contain all exceptions, but that it was merely illustrative, and that there might be many other instances of discrimination which properly could be held not to be unjust. Is it not perfectly obvious, in view of this condition of the law and in view of the great difficulty of making practically effective any such indefinite statute, that Congress had some purpose in the omission of these words "undue," "unreasonable," and "unjust" from the Elkins Act, and intended to so frame the statute as to make it definite and certain and capable of practical enforcement?

IV.

The granting of free transportation of property under the franks of the express companies is not permitted by section 1 of the Interstate Commerce Act as amended June 29, 1906.

From the consideration of the sections of the statute to which we have already directed attention, it follows that appellants have no justification of the acts complained of, unless that justification is to be

found in the antipass provision of section 1 of the Hepburn Act of June 29, 1906.

Does the granting of the free transportation complained of fall within the scope of that exception?

The material portion of said section 1 (34 Stat., 584,) is as follows:

> No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of soldiers' and sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such Homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attend-

> ing any legal investigation in which the common carrier is interested, persons injured in wrecks, and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

Does the word "pass" as used in this section include the granting of free transportation of property by the express companies?

This provision of the act, in the first place, contains the general prohibition against the issuing or giving of "any interstate free ticket, free pass, or free transportation *for passengers*." Then follow the exceptions to the general prohibition and the enumeration of the classes of persons to whom free transportation as passengers may be given. That this portion of the section is limited in its scope to the transportation of passengers is obvious not only from the use of the words "for passengers," but from an examination of the exceptions to the general rule laid down in the first part of the provision. Every one of the exceptions relates to the free transportation as passengers of the class of persons named.

It is argued, however, on behalf of the respondent express companies that the *proviso*, "this provision shall not be construed to prohibit interchange of passes for the officers, agents, and employees of com-

mon carriers and their families," is broad enough to include the free transportation of property by the express companies. It is said that this is true for the reason that the word "pass," prior to the enactment of the amendatory law of June 29, 1906, was sometimes used in connection with the free carriage of property by the express companies. It appears from the exhibits on file in the case, however, that the term "pass" was not used by the express companies as a noun; that is to say, as the word designating that which entitled the holder to such free transportation. In some of the stamps, cards, and pasters the word is used as a verb, and it is said that the express company will pass over its lines the property of the holder. The word which is used to designate the instrument entitling the holder to the free transportation is "frank" and generally even where the word "pass" is used the word "frank" is employed also. For example, in one of the forms of frank issued by Wells, Fargo & Co. it is said:

> Wells, Fargo & Company will pass over its lines at owner's risk of loss or damage one package to which this *frank* is attached.

If we assume that Congress intended to give to the word "pass" the meaning in which it is ordinarily used, it is impossible to interpret the *proviso* in question so as to include the transportation of property. In Webster's Unabridged Dictionary pass is defined as follows:

> A request or order to give passage to a person; a document entitling one to pass, or to

> go and come; a passport; a ticket of free transit or free admission.

In the Century Dictionary a pass is defined as follows:

> Permission or license to pass; a permit or writing either to come or go; a ticket or writing giving one free admission or transit: As a pass to the theatre; a railway pass; also often by abbreviation a passport.

And to the same effect are the definitions in Webster's International Dictionary and the Standard Dictionary.

On the other hand, the word "frank" is ordinarily employed, as may be seen from the definition of the word in the different dictionaries, in connection with the transportation of property. If we interpret the provision in question to refer to the transportation of property, we must impute to Congress an intention to use the word "pass" quite out of its ordinary meaning.

If for the purpose of argument, however, we assume that the word "pass" as used in the *proviso* is broad enough in meaning to cover in some cases the transportation of property, still we are obliged by well-established rules of construction to confine its meaning here to the transportation of persons. As has been pointed out, that portion of the section in question which precedes the *proviso* is expressly limited in its scope to the transportation of persons. There is, first, the general prohibition against the giving of free transportation for passengers. Then follow the

exceptions to the general provisions, in connection with which the *proviso* is inserted.

It is a general rule of statutory construction that a *proviso* in a statute is intended to qualify what is affirmed by the body of the act. It takes out of the operation of the enactment what would otherwise be within it. The office of a *proviso* generally is either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to acts not intended to be brought within its purview. The *proviso* must be interpreted in the light of that to which it is an exception, and must not be given a broader meaning than such prior portion, unless no other construction is possible.

Potter's Dwarris on Statutes, page 118.
2 Lewis' Sutherland on Statutory Construction, sections 351–352.
Sutton v. *People*, 145 Ills., 279, 285.
Huddleston v. *Francis*, 124 Ills., 195–198.
United States v. *Dickson*, 15 Peters, 141, 164.
Minis v. *United States*, 15 Peters, 423, 445.
Savings Bank v. *U. S.*, 19 Wallace, 227, 235.
White v. *United States*, 191 U. S., 545, 551.

In *United States* v. *Dickson* (15 Peters, 141, 163), Justice Story says:

> We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a *proviso* is afterwards introduced, that *proviso* is

> construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. *In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.*

In *Savings Bank* v. *U. S.* (19 Wallace, 227, 235), it is said:

> It is argued, however, that savings institutions were relieved by the *proviso* to the section. That, of course, is to be construed in connection with the section of which it is a part, and it is substantially an exception. *It takes out of the operation of the body of the enactment that which otherwise would be within it. It restrains the generality of the previous provision.*

In *Sutton* v. *People* (145 Ills., 279, 285), it is said:

> It is a familiar rule of construction that "a proviso in a statute is intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it."

See, also, decision of *Interstate Com. Com., In re Parmelee Company*, decided March 25, 1907.

In the case of *Sutton* v. *People*, *supra*, the rule of construction was applied to a statute penal in its nature, and the principle of construction above stated is unquestionably a general rule to be applied to all statutes.

U. S. v. *Lacher*, 134 U. S., 624, 628.

Northern Securities Company v. *U. S.*, 193 U. S., 197.

In *U. S.* v. *Lacher, supra*, it is said:

> Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

In the same case the following from Sedgwick on Statutory and Constitutional Law, second edition, 282, was quoted with approval.

> The rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope.

Applying these principles to the construction of the section in question, we find th the general provisions are limited in their subject-matter to the transportation of passengers. The *proviso* must be construed as "carving out" an exception from that which is covered by the preceding portion of the statute. The exception carved out by it, therefore, is an exception from a provision which is limited to the transportation of passengers, and, therefore,

the same limitation must be placed upon the *proviso*. It follows that this section can not be construed to warrant the granting of transportation under franks, as disclosed in the cases at bar.

The learned counsel for the appellant seems to concede the general rule to be as we have above pointed out. It is claimed, however, that in some cases the rule has not been applied and that the words following the *proviso* have been given the same construction as if they stood in an independent statute. An examination of the cases referred to, however, will show that this exception to the general rule is to be permitted only when the subject covered by the *proviso* has no relation whatever to that which precedes; it has been merely tacked on to the act by the legislature without its having any bearing whatever on the subject-matter of the act. Thus, in the case of the *Georgia Banking Co.* v. *Smith* (128 U. S., 174), Mr. Justice Field said (p. 181):

> The general purpose of a *proviso*, as is well known, is to except the clause covered by it from the general provisions of a statute or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "*Provided*,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater

> signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. *Several illustrations are given by counsel of the use of the term in this sense showing in such cases where an amendment has been made, though the provision following after has no relation to what precedes it.*

The rule of construction for which we contend is fairly applicable to the statute in question, for the reason that by its very terms it is limited to that which precedes, viz, the free transportation of passengers. The language of the *proviso* is (34 Stat., 584, 585):

> *Provided*, That *this provision* shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

The *proviso* in question is a declaration by Congress of the construction which is to be placed upon that which goes before, and by no process of reasoning can its construction be extended so as to give direct permission to do something prohibited by other portions of the act and not covered by the exception which precedes it. To place upon the statute the construction contended for by counsel for appellants is to ignore one of the most elementary rules of statutory construction.

V.

The contention of appellants that the gratuitous transportation of the property in question is not commerce.

In justification of the granting of the free transportation involved in this case, it is contended that this transportation is in no way connected with trade or commerce and, therefore, it does not fall within the scope of the regulations of the interstate commerce acts. A distinction is drawn between transportation of personal packages of an employee of one of the appellant express companies, or an employee of a common carrier and the packages of other persons. Of course it must be conceded that the nature of the carriage is precisely the same. In a given case the property will be the same kind as that transported for the public generally; the points between which the transportation is conducted will be the same; every act in connection with the handling of the property will be identical with the acts performed in handling the same kind of property for the general public.

For example, one of the express companies gives to an employee of a railway company one of the franks set out in the petitions. That frank entitles the holder to the free transportation of a package in accordance with certain rules. The holder of the frank purchases goods for his personal use from a merchant in New York or Chicago and has them shipped to his home in another State and upon presentation of his frank can have the express charges upon the shipment marked paid, when in fact he has

paid no money to the express companies for the carriage. It is difficult to see how any distinction can be drawn between this situation and that of his neighbor, who buys the same kind of goods from the same place and from the same merchant and who, when the goods are delivered at his door, is required to pay the charges for the transportation specified in the schedules published and filed by the express company in accordance with the interstate commerce act. Nor is there any process of reasoning by which the transportation of the property in one case can be excluded from the category of interstate commerce while in the other it is included.

It must be borne in mind that there is nothing in the terms of any of these franks which precludes the transportation of articles purchased in the market by the holder for his personal use and transportation at the direction of the holder of the frank.

In this connection, in determining the nature of the transportation carried on under these franks, it is well to bear in mind the other side of the situation. Let us again take the case of the exchange of franks for passage. In return for the granting of the franks to the employees of a railroad company by the express company, the railroad company gives a pass to employees of the express company. That pass entitles the holder to precisely the same kind of transportation as that for which his neighbor is required to pay in dollars and cents the rate specified in the schedules published and filed by the railroad company. Can it be said that this transportation is not commerce, and

if carried on between a point in one State and a point in another is not interstate commerce?

In *Hanly* v. *Kansas City Southern Ry. Co.* (187 U. S., 617, 619) this court said:

> Transportation for others as an independent business is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

In *Adair* v. *United States* (208 U. S., 161, 176), it is said:

> Let us inquire what is commerce, the power to regulate which is given to Congress.
>
> This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph—indeed every species of commercial intercourse among the several States, but not to that commerce "completely internal which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that

> which is done is in plain violation of the Constitution. (*Northern Securities Co.* v. *U. S.*, 193 U. S., 197, and authorities there cited.)

Certainly the transportation by an express company of a package belonging to one of its own employees or to the employee of a railway company from a point in one State to a point in another is as much interstate commerce as is the transportation of a package for any other person. It seems perfectly clear, therefore, that the transportation involved in these cases falls within the scope of the provisions of the interstate commerce acts.

VI.

The Rule of the Interstate Commerce Commission issued October 12, 1906.

Counsel for appellants have referred to the general rule issued October 12, 1906, by the Interstate Commerce Commission (12 I. C. C. Reports) as follows:

> But the Commission does not construe the law as preventing a carrier from giving the necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing an act which must benefit, the carrier, nor from giving the free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of or in the interest of the carrier by which he is employed.

In attempting to invoke this ruling of the Commission, we respectfully submit that counsel has

overlooked a vital distinction growing out of the state of facts in the cases at bar. It is one thing for a carrier to transport free tools which are used by one of its employees in his work. It is an entirely different thing to transport free for that employee all property which happens to belong to him and which he desires to have carried from one place to another for his personal use. The holder of one of the franks in question is not limited in using it to transportation of property to be used in connection with the business of the express company itself, but he is entitled under it to free transportation of anything belonging to him falling within the classes of personal property named in the frank, and also to the free transportation of anything which he acquires as an article of trade or commerce for his personal use.

Can it be contended for a moment that under the terms of the franks in these cases, the holder of one of them who lives in Washington may not purchase goods in New York for his own personal use and direct that they be sent to his home in Washington by express and upon delivery have the express charges remitted by presenting his frank? The franks do not limit the right to free transportation to property to be used in connection with the express company's business or to transportation made necessary by something which has been done in connection with the conduct of the business of the carrier. The appellant express companies have made no attempt to bring themselves within the limits of

the rule of the Interstate Commerce Commission above referred to. They have made the grant of free transportation in general terms and without regard to whether the transportation is in connection with the business of the company or not.

VII.

Conclusion.

The transportation involved in these cases is transportation subject to the provisions of the interstate commerce acts. The granting of such transportation free to the classes of persons named in the petitions is unquestionably a departure from the published and filed schedules of the appellant carriers. It is not sought, however, to sustain these petitions upon that narrow ground alone. The giving of this free transportation, even though it were specified in the established schedules, is a discrimination; and the Elkins Act prohibits every kind of discrimination not expressly excepted in the act. Even under the provisions of the original act prohibiting *unjust* discriminations, the giving of this free transportation must be held, as a question of fact, to amount to an *unjust* discrimination, because the distinction drawn does not relate to the nature of the carriage, but to the person whose property is transported. The giving of this free transportation does not fall within any of the exceptions in the acts in question. It is not covered by section 22 of the original act. It is not covered by the anti-

pass provision in section 1 of the Hepburn Act. The exception there relates solely to the transportation of persons and has no application to the carriage of the property; the permission to exchange passes given in the *proviso* must be limited in its application to the subject-matter of the exception to which it in terms refers.

It is, therefore, respectfully submitted that the decrees in these cases should be affirmed.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

O

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 405.

[redacted]

[redacted]

[redacted]

BRIEF FOR APPELLANT.

[redacted]

Counsel for Appellant.

[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 405.

AMERICAN EXPRESS COMPANY, *Appellant*,

vs.

UNITED STATES, *Defendant*.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is one of five suits brought in the circuit court at the same time, and all substantially alike, to enjoin the defendants, who are express companies, from issuing franks for the free transportation of express packages to their officers and employes, and members of their families, or to the officers and employes of other express companies and transportation companies, or members of their families, on the claim that such free transportation is forbidden by the Interstate Commerce Act, as amended June 29, 1906,

and by the Elkins Act. The material sections of both acts are printed as an appendix to this brief.

The case was tried upon the petition, answer, replication and stipulation of facts, and resulted in a decree, entered April 24, 1908, enjoining the appellant, who was defendant below, from "issuing any frank or other document for the free transportation of property to the following persons, to-wit: the officers, agents, attorneys, and employes of said defendant and their respective families; the officers and employes of other express companies and their respective families; the officers and employes of any railroad or any other common carrier subject to the Act to Regulate Commerce and its amendments, and their respective families; or to any of said persons; and from transporting and forwarding for said persons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said Interstate Commerce Act and its amendments." (R. 31.)

In allowing an appeal to this court, the circuit court (R. 33) suspended the injunction awarded by its decree until December 1, 1908, or the further order of this court, provided the appellant should file the transcript on appeal in this court within thirty days, a condition which was complied with.

The stipulation of facts shows that appellant did not issue passes except to its own officers and employes, and members of their families, and to the officers and employes of other express companies and transportation companies and members of their families, in exchange for passes issued by the latter to officers and employes of appellant. All passes so issued provided that they should not be used for business packages, or for the transportation of extra heavy weight, money, bonds, jewelry or live stock, but only for the

personal packages of the holder, and they required him to assume all risk of loss or damage from whatever cause, to the property carried. See form of franks and passes given as exhibits, following page 16 of the Record.

ASSIGNMENT OF ERRORS.

The formal assignment of errors filed in the circuit court is found at page 32 of the Record. The assignments may be summarized in the claim that the circuit court erred in construing the Interstate Commerce Act as prohibiting express companies from giving passes for the transportation of personal packages to their officers and employes and members of their families, and to the officers and employes of other transportation companies, and members of their families, in exchange for passes issued by the latter to the officers of the express companies. If the Interstate Commerce Act does not forbid the giving of such passes, the circuit court erred in not dismissing the petition, because there was no evidence that appellant issued passes to any other classes of persons, or of any other kind.

ARGUMENT.

I.

It is a matter of common knowledge, and shown also by the stipulation of facts, that the custom of express companies to issue such passes was one of long standing and presumably known to Congress. There is no record of any protest against it to or by the Interstate Commerce Commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited. There is no direct or express prohibition in the statute. On the contrary, the Interstate Commerce Act recognizes, and

always has recognized that the granting of similar privileges to the officers and employes of railroad companies is consistent with sound public policy. Section 22 has always provided that nothing in the act "shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes." And section 1, as amended June 29, 1906, expressly exempts the officers and employes of common carriers and their families, from the prohibition against free passenger transportation, and declares further that the provision "shall not be construed to prohibit the interchange of passes for the officers, agents and employes of ***common carriers*** and their families." The same section declares that "the term 'common carrier' as used in this Act, shall include express companies."

The reason for making these exemptions in favor of the employes of common carriers, and members of their families, is obvious. It is adverted to in Steamboat New World vs. King, 16 How. 469, 473, where Mr. Justice Curtis, referring to the custom of steamboats to carry steamboat-men free, said:

"It is proved that the custom thus to receive steamboatmen is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it, and the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants."

Congress doubtless considered that the granting of such privileges to the employes of transportation companies would

not affect commerce injuriously, but on the contrary would promote the efficiency and economy of the service and in that way benefit the public indirectly. It is an arduous service, and in some departments hazardous, and takes men away from their homes and families. The small privileges which employes passes give costs the public nothing, and the companies little, in comparison with the good feeling which it promotes between employer and employe, and the esprit de corps that it develops among the men themselves. In the language of Mr. Justice Curtis it "renders the employment more desirable" and "enables the employer more easily and cheaply to obtain men to supply his wants."

The interchange of passes between the express companies and railroad companies is important to both. The stipulation of facts and the more detailed description of the express business given by Chief Justice Waite in the Express Cases, 117 U. S. 1, and by Mr. Justice Shiras in Baltimore & Ohio Southwestern Railway Company vs. Voigt, 176 U. S. 498, show the intimate relations between the express companies and the railroad companies in the daily conduct of their business, and the importance to both of the friendly co-operation and mutual good-will of their officers and employes, which the interchange of personal passes tends to promote. The Chief Justice refers to "the varying details of a business which is to be adjusted between two public servants so that each can perform in the best manner its own particular duties" (117 U. S. 24), and Mr. Justice Shiras calls the relation between the railroads and the express companies "to a certain extent a sort of partnership relation between them in carrying on a common carrier business." 176 U. S. 511.

II.

In the circuit court, the Government claimed that the provision of section 1 for "the interchange of passes for the officers, agents, and employes of common carriers, and their families," relates only to passenger passes, because it is in the form of a proviso to a provision which deals only with free transportation of passengers. It is true that the usual office of a proviso is to qualify the generality of that which precedes and to exclude from its operation that which would otherwise be included, but it is often used for another purpose, and in this case was evidently used as an introduction to an amendment offered after the bill was reported, for the purpose of extending the privilege of interchanging employes passes to all common carriers subject to the act.

If that was not its purpose it was unnecessary, for section 22 already covered the case of "railroad companies" and allowed them to give passes "to their own officers and employes" and to exchange passes "with other railroad companies for their officers and employes." When section 22 was adopted express companies were not subject to the act (88 Fed. 659). They and sleeping car companies were brought in by the amendments of June 29, 1906, and the evident purpose of the sentence following the word "provided" in section 1 was to extend to them the privilege of giving and exchanging passes already accorded to railroad companies by section 22.

If the purpose of the proviso was not to enlarge section 22, but only to make it plain that the interchanging of railroad passes, allowed by section 22, was not intended to be affected by the amendments of June 29, 1906, the proviso would have read as follows:

"Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employes of *railroad companies* [instead of common carriers] and their families."

Concerning the office of a proviso we call the attention of the court to the following cases:

In Georgia Banking Co. vs. Smith, 128 U. S. 174, 181, Mr. Justice Field said:

"The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

In Interstate Commerce Commission vs. Baird, 194 U. S. 25, 36, 37, the foregoing passage is quoted with approval, and the principle applied to a proviso in section 3 of the Elkins Act. Mr. Justice Day said:

"It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. Minis vs. United States, 15 Pet. 423; Austin vs. United States, 155 U. S. 417, 431; White vs. United States, 191 U. S. 545, 551. It is apparent that this proviso [in section 3 of the Elkins Act] was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before.

In Chesapeake & Potomac Tel. Co. vs. Manning, 186 U. S. 238, 242, the subject was under consideration, and Mr. Justice Brewer, delivering the opinion, while recognizing the restrictive office of a proviso as stated by Mr. Justice Story in Minis vs. United States, 15 Pet. 423, 445, added: 'While this is the general effect of a proviso, yet in practice it is not always so limited.' "

In Baggaley vs. Pittsburg & Lake Superior Iron Co. 90 Fed. 636, Lurton, C. J., said, p. 638:

"We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act."

In construing the proviso, it is well to remember that it was put into the bill prior to the time when the provision including express companies was inserted. When it was put in, two kinds of passes were known and issued by common carriers, namely, railroad passenger passes and express passes. The proviso was inserted in contemplation of these two kinds of passes and of the well-known custom of interchanging them. And when Congress, in contemplation of that custom, said that the provision should not be construed to prohibit the interchange of passes for the officers, agents and employes of *common carriers* and their families, it meant to say, among other things, that railroads should not be prohibited from interchanging passes with express companies, as they had always done. When, later, in the Congressional proceedings, the Senate amended the act by inserting the words, "The term 'common carrier,' as used in this act, shall include express companies and sleeping-car

companies," it is to be presumed that they intended it to be read with the proviso as to passes, and that section 1, forbidding the issuance of railroad passes, except in specified cases, should not be construed to prohibit a railroad from giving a railroad pass in exchange for an express pass.

If express companies may not give employes passes to railroad companies they have nothing to exchange, and railroad companies can not give their passes to the officers and employes of express companies. This was not the intention of Congress, for it contemplated "the interchange of passes for the officers, agents, and employes of *common carriers*, and their families."

III.

The circuit court held that express companies are not at liberty to carry the personal packages of their employes free, or to exchange employes passes with other common carriers, because they are not specifically named in section 22, which provides that "nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes."

But this court has held that section 22 is only illustrative and not exclusive. When that section was adopted express companies were not subject to the act and were therefore not named, but when they were brought in by the amendment of June 29, 1906, they came within the spirit and principle of section 22, and also within the spirit and principle of the proviso in section 1, that "this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers, and their families," and within the spirit of the exemption in that section of the employes of railroad companies, and

their families, from the prohibition against free passenger transportation.

In Interstate Commerce Commission vs. Baltimore & Ohio Railroad Company, 145 U. S. 263, 278, Mr. Justice Brown said:

"The unlawfulness defined by sections 2 and 3 consists either in an 'unjust discrimination' or an 'undue or unreasonable preference or advantage,' and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive."

The circuit court in its opinion (R. 28) conceded that there is no just reason why express companies should not have the same liberty of issuing and interchanging employes passes, as railroad companies. If free service to the employes of railroad companies is not unjust discrimination neither is free service to the employes of express companies.

That express companies were first brought under the Interstate Commerce Act by the amendments of June 29, 1906, is shown by the following statement of District Judge Baker, giving the history of the subject in Southern Indiana Express Company vs. United States Express Company, 88 Fed. 659, 662; affirmed 92 Fed. 1022, 35 C. C. A. 172:

"At an early day the question was raised whether express companies were subject to the provisions of the interstate commerce act, and, after full argument and deliberate consideration, the interstate commerce commission unanimously decided that the act did not apply to express companies properly so termed; that is to say, to independent organizations that carried on an express or parcel business in the usual manner, and which did not operate railway

lines. In re Express Companies, 1 I. C. C. R. 349; 1 Int. Com. Rep. 677. This case was decided on December 28, 1887. The commission shortly thereafter called the attention of Congress to their ruling, and suggested such an amendment of the law as would place express companies within their jurisdiction; but, although more than 10 years have elapsed, Congress has taken no action on the subject. The same conclusion was reached in U. S. vs. Morsman, 42 Fed. 448. After a careful consideration of the question, I see no reason to doubt the correctness of the conclusions reached in these cases."

IV.

If Congress, in putting express companies under the Interstate Commerce Act, had intended to prohibit them from continuing their long established and well known practice of issuing passes to their employes and members of their families, and of exchanging employes passes with other express companies and railroad companies, the prohibition would have been stated in explicit language, and not left to inference. Congress had the question of free service before it in 1906 and discussed the subject at great length. The fact that it passed a law against free passenger service and said nothing on the subject of the free carriage of property, and that the employes of the carriers were exempted from the law that was passed, is an important circumstance in ascertaining the legislative intent, and inconsistent with the claim that Congress meant to prohibit employes express franks.

There had been no complaint against the free carriage of property, or any practice on the part of the railroads to carry property for the public free, and the Interstate Commerce Act was not passed for the purpose of remedying any evil in that connection. So far as the transportation of property is concerned, the public complaint was against discriminatory rates and secret rebates to favored shippers,

and the statute was aimed at those evils. It nowhere forbids the free carriage of property per se, nor indeed until the amendment of section 1 on June 29, 1906, was the free carriage of persons forbidden.

The Interstate Commerce Act does not purport to regulate all common carriers nor the carriers that are subject to the act in all of their relations. Section 6 declares "that wherever the word 'carrier' occurs in this act, it shall be held to mean 'common carrier.'" But the service which the express companies perform for the holders of employes passes is not that of common carrier, because it is gratuitous, and the holder is required to assume all risk of loss or damage from whatever cause, to the property carried.

Schouler on Bailments (3d ed.), Sec. 343, says:

"No one is to be designated as a common carrier in a particular case, unless he performed as a carrier for hire."

In Northern Pacific Railway Company vs. Adams, 192 United States, 440, it was held that a railroad company does not stand in the relation of a carrier for hire to the employe of another railroad, riding on a free pass, and is not responsible to the holder of the pass for injuries resulting from ordinary negligence.

Mr. Justice Brewer, citing and approving Baltimore and Ohio Southwestern Railway Co. vs. Voight, 176 U. S. 498, at p. 453, says:

"In the light of this decision but one answer can be made to the question. The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. . . . If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the

privilege offered, and having accepted that privilege can not repudiate the conditions. . . . So far as the element of contract controls it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

In Quimby vs. Boston & Maine Railroad, 150 Mass. 365, Mr. Justice Devens said:

"In such instances one who is ordinarily a common carrier does not act as such but is simply in the position of a gratuitous bailee. The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform and is outside of his regular duties. In yielding to the solicitation of the passenger he consents for the time being to put off his public employment and do that which it does not impose upon him."

V.

But although employes express franks are not expressly prohibited by the Interstate Commerce Act, the question remains whether they violate sections 2, 3 or 6 of the act, or section 1 of the Elkins Act, which prohibit unjust discrimination and undue and unreasonable preference or advantage.

None of those sections were amended on that point by the act of June 29, 1906, and all of them apply equally to property and passengers. If, therefore, they prohibit free carriage of property per se, they also prohibit free carriage of passengers, and prohibited both prior to June 29, 1906. But the action of Congress, in passing the amendment of section 1, which prohibits free passenger transportation, and in postponing its operation for six months until January 1, 1907, is inconsistent with the claim that the thing thereby prohibited was already prohibited. On the contrary, the fair inference is that Congress under-

stood that free transportation of persons or property was not absolutely forbidden by sections 2, 3 or 6 of the Interstate Commerce Act, or by section 1 of the Elkins Act. None of those sections deals with free service. They all deal with service for compensation.

Section 2, defining unjust discrimination, makes it unlawful for a common carrier to "demand, collect, or receive from any person or persons a greater or less *compensation* for any service rendered," etc. This does not refer to gratuitous service, but to service for hire, where, "by any special rate, rebate, drawback or other device" a greater or less *compensation* is charged to one person than another.

The same is true of section 6, which requires carriers to file and publish their rates, and provides that they shall not "charge or demand or collect or receive a greater or less or different *compensation* for such transportation," than the rates so filed and published.

So by section 1 of the Elkins Act, which was not amended in this respect in 1906, it is made unlawful to offer, grant, give, solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property, "whereby any such property shall, by any device whatever, be transported *at a less rate* than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce, and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced." The language refers to carriage at rates, for hire. The words, "whereby any other advantage is given or discrimination is practiced," refer to the undue or unreasonable advantages, and the unjust discriminations forbidden by sections 2 and 3 of the Interstate Commerce Act.

Section 3 is a copy of the undue preference clause of the English Railway and Canal Traffic Act of 1854, sec. 2, which has been held to apply only where there is some sort

of competition between the parties complaining and those to whom an undue or unreasonable preference or advantage is claimed to have been given.

> Hozier vs. The Caledonian Railway Company, 1 Railway and Canal Traffic Cases, 27.
>
> Lees et al. vs. Lancashire and Yorkshire Railway Company, 1 Railway and Canal Traffic Cases, 352, 366.

In the first of the foregoing cases the petitioner, Hozier, who resided near Motherwell, which is on the Caledonian Railway between Edinburgh and Glasgow, and who had frequent occasion to travel between Motherwell and Edinburgh and Motherwell and Glasgow, complained that the rates charged between Edinburgh and Motherwell and Motherwell and Glasgow, as compared with the rates for passengers traveling through between Edinburgh and Glasgow, amounted to an undue and unreasonable preference in favor of such through passengers over the petitioner and others traveling between Motherwell and Edinburgh, or Motherwell and Glasgow, or intermediate places.

The Lord President delivering judgment dismissing the petition, said, at page 30:

"I put the question whether he [the petitioner] suffered any disadvantage by the proportional rating complained of; and the answer was, that he did not complain of any disadvantage, but that he did not choose that parties traveling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of traveling than he himself could enjoy. It does not appear to me to be a matter which the statute provides for at all. It provides for giving undue preference to parties pari passu in the matter, but you must bring them into competition in order to give them an interest to complain."

In United States vs. Chicago & N. W. Ry. Co. 127 Fed. 785, the circuit court of appeals for the seventh circuit,

held that the refusal of the defendant to give the government, for the transportation of soldiers, the same rates that it gave to theatrical companies, etc., was not an unjust discrimination and did not subject the government to undue prejudice or disadvantage in violation of the Interstate Commerce Act. The decision was put on the ground that—

"The government of the United States, in the transportation of its soldiers, does not financially, or in any other manner, come in competition of any kind with any of the parties who are given the party rates provided for theatrical companies," etc.

The court said, at page 789:

"It is only unfair and unjust discrimination that the statute, as well as the common law, is aimed at. If two persons or corporations are engaged in the same business, and their situation is substantially alike, any discrimination in rates would be prohibited as invidious and unjust. It has always been held lawful at common law, and is so under the statute, to allow ministers of the gospel to travel on half-fare tickets. They do not come in competition with business men, and no injustice is done to anybody."

A member of the public who employs an express company as a carrier for hire, is not subjected to undue or unreasonable prejudice or disadvantage, within the meaning of section 3, because the company occasionally carries a personal package of an employe free, as an incident of his employment. It might as well be said that an employe who is not entitled to a frank, under the rules of the company, is subjected to undue or unreasonable prejudice and disadvantage, within the meaning of the Interstate Commerce Act, because an employe of a different grade or longer service gets a frank.

In Texas and Pacific Railway Company vs. Interstate Commerce Commission, 162 U. S. 197, the court said, p. 218:

"The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation or locality must not be *undue or unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act." (The italics are in the opinion.)

In the circuit court the Government dwelt on the fact that in the Elkins Act, passed February 19, 1903, which is unchanged in that respect by the amendments of June 29, 1906, the word discrimination is used without the qualifying adjective "unjust," and the word advantage without the adjective "unreasonable." On that point the circuit court said (R. 22):

"It is contended by the Government that this omission discloses the intention on the part of Congress, 'to require common carriers in interstate commerce to publish and file schedules of rates, to adhere absolutely to such rates, and to grant no preferences or discriminations unless expressly authorized by the statute.' It may be doubted whether Congress intended by this language to broaden the prohibitions of the act in that respect. It is difficult to conceive of the term discrimination, prejudice, or disadvantage as not associated with what is unjust, unreasonable, and undue. It is true the adjectives are dwelt upon in the former decisions of the court with considerable emphasis. It hardly seems, however, as though their absence would have modified the opinion rendered in those cases. Webster defines the word 'discrimination,' with reference to railroads, as 'the arbitrary imposition of unequal tariff for substantially the same service,' investing it with the sense of unjustness and unfairness.

So far as appears, the supreme court has not had its attention called to the change, and has given it no construc-

tion. In Platt vs. LeCocq, 150 Fed. Rep. 391, the words 'prejudice and disadvantage' of the South Dakota statute were construed to mean unreasonable prejudice or disadvantage. In view of these considerations, and bearing in mind the general trend of the statute and amendments thereof, there seems to be no sufficient basis for the construction of the Elkins Act asked for by the Government in that respect."

The purpose of the Elkins Act was to prescribe penalties and supply remedies for the better and more effectual enforcement of the Interstate Commerce Act. It had been found difficult to secure convictions against employes of carriers, who alone were made criminally liable by the Interstate Commerce Act, and so by the Elkins Act the carriers themselves were made equally liable with their officers and employes for that which prior thereto was a misdemeanor only as against the individual; and the shippers were also brought in, and the soliciting, accepting or receiving of rebates, concessions or discriminations in any form, or by any device, was made an offense equally with the offering, granting or giving thereof. But all had relation to the unjust discrimination and the undue and unreasonable advantages forbidden by the Interstate Commerce Act.

VI.

The free carriage of persons or property may be a cloak for a rebate, or, under certain circumstances, an unlawful discrimination, in violation of the statute. But it is impossible for the Government to maintain that the issuing of employes passes in good faith by express companies is unjust discrimination or unreasonable advantage, within the prohibition of the statute, in the face of its explicit declarations concerning passes issued by railroad companies to the same class of persons, for the same reasons, and under similar circumstances.

The case of the express companies is not substantially

different from that of the railroad companies, for they are engaged in "a sort of partnership relation in carrying on a common carrier business," and the court should not make a distinction between them in the absence of clear and specific language in the statute, especially as the practice which the circuit court has enjoined was lawful at common law, is beneficial to the express companies in the conduct of their business, and is not injurious to the public.

Section 22 does not, in affirmative terms, give railroads the right to issue employes passes. It says only that "nothing in this act *shall be construed* to *prevent*" them from doing so. But if nothing in the act is to be construed to prevent railroads from issuing and exchanging employes passes, nothing therein can properly "be construed" to prevent express companies from doing the same thing, for there is no substantial difference between them, and the court has said that the section is "rather illustrative than exclusive."

In Durousseau vs. United States, 6 Cranch, 307, 314, Chief Justice Marshall said:

"The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent."

The words are quoted with approval in the Paquete Habana, 175 U. S. 677, 685, and in Glover vs. United States, 164 U. S. 297, Mr. Justice White said:

"The law must be interpreted in accordance with its spirit so as to effectuate the purpose intended to be accomplished thereby."

In Cincinnati, New Orleans & Texas Pacific Railway Company vs. Interstate Commerce Commission, 162 U. S. 184, 197, and on several occasions since then (200 U. S. 554; 209 U. S. 119), the court has quoted with approval the fol-

lowing words of Justice Jackson, when circuit judge, in the case of the Interstate Commerce Commission vs. Baltimore & Ohio Railroad Company, 43 Fed. 37, which was affirmed by this court, 145 U. S. 263:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

We respectfully submit that the decree should be reversed and the case remanded with directions to dismiss the petition.

LAWRENCE MAXWELL,
Counsel for Appellant.

LEWIS CASS LEDYARD,
Counsel for the American and
National Express Companies.

FRANK H. PLATT,
Counsel for the
United States Express Company.

CARL A. DEGERSDORF,
Counsel for the
Adams Express Company.

W. W. GREEN,
CHARLES W. STOCKTON,
Counsel for
Wells, Fargo & Company.

MATERIAL SECTIONS OF THE STATUTES.

Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379.

SECTION 1. This section was amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, by adding the following:

The term "common carrier" as used in this Act shall include express companies and sleeping car companies.

Also by adding the following:

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such Homes; to necessary caretakers of live stock, poultry and fruit; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employes, post-

office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offence, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.

SECTION 2. [Never amended.] That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of un-

just discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3. [Never amended.] That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 6. This section was amended March 2, 1889, c. 382, 25 Stat. 855, and June 29, 1906, c. 3591, 34 Stat. 584. After providing for the filing and publishing of rates, and the method of changing them, it declares:

Up to June 29, 1906.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any servi-

As amended June 29, 1906.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act: nor shall any carrier charge or demand

ces in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, that wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

SECTION 22. [As amended March 2, 1889, and February 8, 1895. Not amended by the Act of June 29, 1906.] That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United

States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; etc. [The words after the last semicolon have never been amended].

Elkins Act, February 19, 1903, c. 708, 32 Stat. 847.

SECTION 1. [As amended June 29, 1906. The additions made by that amendment are in brackets.] That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such cor-

poration, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offence; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation [whether carrier or shipper], who shall [knowingly], offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not

less than one thousand dollars nor more than twenty thousand dollars: etc.

SECTION 3. [Never amended.] That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction, etc.

AMERICAN EXPRESS COMPANY *v.* UNITED STATES.
NATIONAL EXPRESS COMPANY *v.* SAME.
UNITED STATES EXPRESS COMPANY *v.* SAME.
WELLS, FARGO AND COMPANY *v.* SAME.
ADAMS EXPRESS COMPANY *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 405, 406, 407, 408, 409. Argued November 10, 11, 1908.—Decided February 23, 1909.

The purpose of the Elkins act is to require publication of tariff and to prevent and prohibit all discrimination, and the issuing of express franks falls within such prohibition.

Whether or not the issuing of express franks to officers and employés of express companies and their families is prohibited by § 2 of the Interstate Commerce Act of February 4, 1889, c. 104, 24 Stat. 379, an injunction is authorized under § 3 of the Elkins act of February 19, 1903, c. 708, 32 Stat. 846, wherever a common carrier is engaged in the carriage of passengers or freight at less than the published rate, and by the Hepburn act of June 29, 1906, c. 3591, 34 Stat. 584, express companies are brought within the act, and obliged to file and publish their rates.

The power of Congress over interstate transportation embraces all manner of carriage whether gratuitous or otherwise; and, in the absence of express exceptions, the intention of Congress in enacting the Elkins act was to prevent any departure whatever from published rates.

The exceptions contained in the provision in § 1 of the Hepburn act of June 29, 1906, c. 3591, 34 Stat. 584, allowing a common carrier to issue passes for free transportation of passengers to certain classes of persons cannot be extended to give express companies the right to issue passes to the same classes of persons for transportation of merchandise.

While a proviso may sometimes be construed as extending rather than limiting legislation each statute must depend on its own terms, and

a proviso will be construed consistently with the legislation under consideration.

Where Congress has used plain and explicit language the only province of the courts is to give effect to the act as plainly expressed in its terms, and if the law is defective in not extending to one class of common carriers privileges extended to another, the remedy is in the hands of Congress and not of the courts.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, with whom *Mr. Lewis Cass Ledyard*, *Mr. Frank H. Platt*, *Mr. Carl A. de Gersdorf*, *Mr. W. W. Green* and *Mr. Charles W. Stockton* were on the brief, for appellant:

The custom of express companies to issue such passes as are herein in question was one of long standing and presumably known to Congress. There is no record of any protest against it to or by the Interstate Commerce Commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited. There is no direct or express prohibition in the statute. On the contrary, the Interstate Commerce Act recognizes, and always has recognized that the granting of similar privileges to the officers and employés of railroad companies is consistent with sound public policy. See § 22 of the act. And § 1, as amended June 29, 1906, expressly exempts officers and employés of common carriers and their families, from the prohibition against free passenger transportation, and declares that the provision shall not prohibit the interchange of passes for officers, agents and employés of common carriers and their families. The same section declares that the term common carrier shall include express companies.

The reason for making these exemptions in favor of the employés of common carriers, and members of their families, is obvious. *Steamboat New World* v. *King*, 16 How. 469, 473; *Express Cases*, 117 U. S. 1; *B. & O. S. W. Ry. Co.* v. *Voigt*, 176 U. S. 498.

The proviso in § 1 for "the interchange of passes for the offi-

cers, agents and employés of common carriers, and their families," relates not only to passenger passes, but was evidently used as an introduction to an amendment offered after the bill was reported, for the purpose of extending the privilege of interchanging employés' passes to all common carriers subject to the act. If not it was unnecessary, for § 22 already covered the case of railroad passes for officers and employés.

As to the office of a proviso, see: *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242; *Baggaley* v. *Pittsburg & Lake Superior Iron Co.*, 90 Fed. Rep. 638.

The failure to specifically mention express companies in § 22 does not operate to exclude them from the privilege of carrying the personal packages of their employés free or of exchanging employés' passes with other common carriers. That section is only illustrative and not exclusive. When that section was adopted express companies were not subject to the act and were therefore not named, but when they were brought in by the amendment of June 29, 1906, they came within the spirit and principle of § 22, and also within the spirit and principle of the proviso in § 1, that this provision should not prohibit the interchange of passes for the officers, agents and employés of common carriers, and their families, and within the spirit of the exemption in that section of the employés of railroad companies, and their families, from the prohibition against free passenger transportation. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U. S. 263, 278.

The Interstate Commerce Act does not purport to regulate all common carriers nor the carriers that are subject to the act in all of their relations. Section 6 declares that wherever the word "carrier" occurs in this act, it shall be held to mean common carrier. But the service which the express companies perform for the holders of employés' passes is not that of common carrier, because it is gratuitous, and the holder is required to assume all risk of loss or damage from whatever cause, to the

property carried. Schouler on Bailments (3d ed.), § 343; *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440; *Baltimore & Ohio S. W. Ry. Co.* v. *Voight*, 176 U. S. 498; *Quimby* v. *Boston & Maine R. R.*, 150 Massachusetts, 365.

The free carriage of persons or property may be a cloak for a rebate, or, under certain circumstances, an unlawful discrimination, in violation of the statute. But it is impossible for the Government to maintain that the issuing of employés' passes in good faith by express companies is unjust discrimination or unreasonable advantage, within the prohibition of the statute, in the face of its explicit declarations concerning passes issued by railroad companies to the same class of persons, for the same reasons, and under similar circumstances.

The case of the express companies is not substantially different from that of the railroad companies, for they are engaged in "a sort of partnership relation in carrying on a common carrier business," and the court should not make a distinction between them in the absence of clear and specific language in the statute, especially as the practice which the Circuit Court has enjoined was lawful at common law, is beneficial to the express companies in the conduct of their business, and is not injurious to the public.

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. *Durousseau* v. *United States*, 6 Cranch, 307, 314. See also *Paquete Habana*, 175 U. S. 677, 685; *Glover* v. *United States*, 164 U. S. 297; *C., N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 197; *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.*, 43 Fed. Rep. 37.

The Attorney General and *The Solicitor General* for the United States:

Transportation under franks by express companies constitutes an unjust discrimination and subjects other shippers

to an unreasonable prejudice within the meaning of §§ 2 and 3 of the Interstate Commerce Act. The term "under substantially similar circumstances and conditions" in § 2 refers to the circumstances and conditions relating to the carriage of the goods and not to the person of the sender. *Re Persons Free or at Reduced Rates by B. & M. R. R. Co.*, 5 I. C. C. Rep. 69; *Harvey* v. *Louisville & Nashville R. R. Co.*, 5 I. C. C. Rep. 153. The effect of the Interstate Commerce Act was to prohibit the granting of free transportation except as provided by § 22. *Ex parte Koehler*, 31 Fed. Rep. 315; *Re Charge to Grand Jury*; 66 Fed. Rep. 146.

The portions of §§ 2 and 3 relating to unjust discrimination were modeled from the English tariff act, and in construing them our courts have followed the interpretation of the English courts. *Interstate Comm. Comm.* v. *Baltimore & O. R. R. Co.*, 145 U. S. 263; *I. C. C.* v. *Alabama Midland R. Co.*, 168 U. S. 144; *Texas & Pacific Ry.* v. *I. C. C.*, 162 U. S. 197. Construing similar sections of the English act, the English courts have unanimously held that the differences in circumstances and conditions relate only to the carriage of goods and the nature and character of the service rendered by the shipper. *Gt. Western R. Co.* v. *Sutton*, L. R. & H. L. 226; *Denaby Main Colliery Co.* v. *Manchester Ry. Co.*, 11 App. Cas. 97.

The provisions of the Interstate Commerce Act require absolute and uniform adherence to the published schedule, and when a carrier has once established, published and filed a rate there can be no departure therefrom which has resulted to the extent of granting free transportation to their own officers and employés and to the officers and employés of other carriers in exchange for like favors from those carriers. See § 6, act June 29, 1906; § 1, Elkins act as amended by act June 29, 1906; *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

The only section of the Interstate Commerce Act which relates in terms to the carriage of property at free or reduced

rates is § 22, 25 Stat. 857, 862, and there is nothing in it which by any possible construction can be taken as covering the granting and interchanging of franks by the express companies charged here. The prohibition of the Elkins act is directed at discriminations and advantages of *every* kind. The original act of 1887 prohibited "unjust" discriminations and "undue" and "unreasonable" prejudices and disadvantages. The change in language in the amendatory legislation shows that Congress was intentionally broadening the scope of the prohibitions against the granting of advantages and discriminations. This is shown by the history of the interstate commerce legislation, and of the times and the evil which the amendatory legislation was intended to remedy. *N. Y., N. H. & H. R. R. Co.* v. *I. C. C.*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56. In passing the Elkins act Congress undoubtedly had in mind decisions of the courts holding that a criminal prosecution could not be maintained under a statute defining with such uncertainty the offense prohibited,—the original statute being so drawn as to leave for a determination of fact in every case whether or not the discrimination was an unjust one. *C. & N. W. Ry.* v. *Dey*, 35 Fed. Rep. 866; *Tozer* v. *United States*, 52 Fed. Rep. 917; *I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S. 263. When Congress drew the provision requiring adherence to established rates and prohibiting the giving of advantages and discriminations, and omitted the words "undue," "unreasonable" and "unjust," its intention was to make the statute definite and certain and capable of practical enforcement, and to put an end to favoritism and all evasions.

There is no justification of the acts complained of to be found in the anti-pass provision of § 1 of the Hepburn act, 34 Stat. 584. That section relates manifestly to the transportation of persons alone and not to the carriage of goods. The term "frank," applies to the transportation of property, while "pass," applies to the transportation of passengers. The proviso manifestly related only to railroads, and when, later, express companies were included in the law, the proviso remained un-

changed and escaped attention; but this is not a manifestation of an intention on the part of Congress to extend the pass interchange to franks for the carriage of property beyond the plain meaning and limitation of all the rest of the section. This is a proviso which must be construed as carving something out of the previous enactment and restraining its generality. The exception carved out is an exception from a proviso which is limited to the transportation of passengers and therefore the same limitation must be placed upon the proviso. *United States* v. *Dickson*, 15 Pet. 141; *Savings Bank* v. *United States*, 19 Wall. 227; *Georgia Banking Co.* v. *Smith*, 128 U. S. 174; *White* v. *United States*, 191 U. S. 545.

MR. JUSTICE DAY delivered the opinion of the court.

These cases are appeals from the Circuit Court of the United States for the Northern District of Illinois and were submitted upon oral argument and printed record and briefs in No. 405. They involve the same question and hence will be disposed of together. The petition was filed in the Circuit Court under the third section of the Elkins act, February 19, 1903, c. 708, 32 Stat. 847, providing for the institution of such suit whenever the Interstate Commerce Commission shall have reasonable grounds for believing that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is granting any discrimination forbidden by law.

An injunction was issued restraining the express companies from "issuing any frank or other document for the free transportation of property to the following persons, to wit: the officers, agents, attorneys, and employés of said defendant and their respective families; the officers and employés of other express companies and their respective families; the officers and employés of any railroad or any other common carrier subject to the act to regulate commerce and its amendments, and their respective families; or to any of said persons; and from trans-

porting and forwarding for said persons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said interstate commerce act and its amendments."

The facts are not seriously in dispute and were stipulated at the trial and show that it has been the custom of express companies for many years to issue franks such as are embraced in the injunction. These franks were not issued except to officers and employés of the companies and their families, and to the officers and employés of other express companies and transportation companies and members of their families, in exchange for passes issued by the latter companies to the officers and employés of the express companies. The franks provided that they should not be used for business packages or for transportation of extra heavy weight, money, bonds, jewelry, live stock, or business consignments, and only for the personal packages of the holder of such frank, he being required to assume all risk of loss or damage from whatever cause to property carried under the frank.

The question is, Does the Interstate Commerce law prohibit express companies from giving free transportation of personal packages to their officers and employés and members of their families, and to the officers of other transportation companies and members of their families in exchange for passes issued by the latter to the officers of the express companies? The Circuit Court held the affirmative of this proposition.

It is the contention of the Government that such transportation is forbidden by § 2 of the act of February 4, 1889, c. 104, 24 Stat. 379, forbidding the transportation of property or passengers subject to the provisions of the act for any person for a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person for doing for him the like service, and by § 3 of the same act (24 Stat. 379, 380) which makes it unlawful to give any undue preference or advantage to any particular persons or

locality, and by the provisions of the Elkins act hereafter quoted.

Without considering whether the case at bar is covered by the sections of the Interstate Commerce act referred to, an injunction is authorized under § 3 of the Elkins act, where a common carrier is engaged in the carriage of passengers or freight at less than the published rate on file, and we shall limit our attention to certain provisions of the Elkins law in this connection. Section 1 of the Elkins act provides (as amended by the Hepburn act, June 29, 1906, c. 3591, 34 Stat. 584, 587):

"The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

* * * * * * * *

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transmission of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to

depart therefrom, shall be deemed to be an offense under this section of this act."

Section six of the Interstate Commerce act, as amended by the same law, provides:

"Nor shall any carrier charge or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the point named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs: *Provided*, That whenever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.'"

The amendment to the Interstate Commerce act by the act of June 29, 1906, c. 3591, 34 Stat. 584, brought express companies within the terms of the act. The express companies were therefore obliged to file and publish their rates for the transportation of property under § 6 of the Interstate Commerce act as amended, and it is admitted in the record that they have done so.

The provisions of the Elkins act to which we have referred have been the subject of consideration in recent cases before this court. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 71. It is unnecessary to repeat the discussion had in those cases as to the prior legislation and the reasons of public policy which led up to the enactment of the sections of the Elkins act above quoted. It is enough to say that it was the purpose of this law to require the publication and posting of tariff rates, open to public inspection, and at the service of all shippers alike; to prohibit and punish secret departures from the published rates, and to prevent and punish rebating, preferences and all acts of undue discrimina-

tion. As was said by Mr. Justice White, speaking for the court in *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission, supra:*

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

In view of the interpretation thus given to the act we think it cannot be doubted that the transportation of property, such as shown in this case, upon franks issued by the express companies, is within the terms of the act. It permits those who hold these franks to obtain the transportation of such property as is covered thereby without compensation, or, if the transportation has been paid, it is refunded to the shipper upon the presentation of the frank. Within the terms used in the Elkins act, such transportation enables one class of persons to obtain transportation at a different and less rate than that named in the published rates.

It is contended that such transportation is not within the terms of the act, as it was not the purpose of Congress to regulate in these provisions gratuitous transportation, but the purpose was to prevent discriminations, rebating and so forth, where property has been carried by a common carrier for hire; that it is a departure from the rates charged for that class of transportation which is the evil to be remedied, and the only one covered by the terms of the act. But the power of Congress over interstate transportation embraces all manner of carriage of that character—whether gratuitous or otherwise—and, in the absence of express exceptions, we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property, in the instances mentioned, free of charge.

If it is lawful, in view of the provisions of the Interstate Commerce act, to issue franks of the character under consideration in this case, then this right must be founded upon some exception incorporated in the act, and it is the contention of the learned counsel for the appellant that such exception is found in the proviso in § 1 of the Hepburn act. This section is given in part in the margin.[1]

---

[1] Act of June 29, 1906, c. 3591, 34 Stat. 584. The term "common carriers" as used in this act shall include express companies and sleeping car companies.

* * * * * * * *

"No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry, and fruit; to employés on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employés, post office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free

As originally reported, this act did not apply to express companies. The section was originally framed with the intention of making a provision for railroad carriers. It is contended that the proviso brings common carriers within the exception of the act, and therefore necessarily includes the express companies. There is no doubt that a proviso has not infrequently been the means of introducing into a law independent legislation, notwithstanding it is the true office of a proviso to restrict the sense or make clear that which has gone before and which might be doubtful because of the generality of the language used. *United States* v. *Dickson*, 15 Pet. 141, 163. This court has had occasion to hold more than once that language used in provisos shows the legislative intention to bring in new matter rather than to limit or explain that which has gone before. *Georgia Banking Co.* v. *Smith*, 128 U. S. 174; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37.

While, therefore, a proviso may sometimes be construed as extending rather than limiting legislation, each statute must depend upon its own terms, and a proviso will be given such construction as is consistent with the legislation under construction.

Turning to § 1 of the Hepburn act, it is apparent that all that immediately precedes the proviso appertains to the carriage of passengers, for common carriers are forbidden to issue or give any free ticket, free pass or free transportation *for passengers*, except to its employés, etc. Until we come to the proviso, the act is clearly thus limited. It is then enacted that this provision, that is, the previous part of the enactment which refers only to the transportation of passengers, shall not be construed to prohibit the interchange of *passes* for the officers, agents and employés of common carriers and their families, or to prohibit any common carrier from *carrying passengers* free in certain cases.

While it is true the language here used has reference to com-

ticket, free pass, or free transportation, shall be subject to a like penalty."

mon carriers and by the terms of the Hepburn act express companies are within that description, yet the proviso is as clearly limited to the carriage of passengers and the interchange of passes for officers, agents and employés of common carriers and their families, as is the body of the section itself.

It is contended that this section if limited to the carriage of passengers was unnecessary in view of the concluding part of § 22 of the act of February 4, 1887, c. 104, 24 Stat. 379, 387, as amended by the acts of March 2, 1889, c. 382, 25 Stat. 855, 862, and February 8, 1895, c. 61, 28 Stat. 643, which provides: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés;" etc.

But we are to consider the language which Congress has used in passing a given law, and when the language is plain and explicit our only province is to give effect to the act as plainly expressed in its terms. We are clearly of the opinion that, without doing violence to the language used in § 1—including the proviso—its terms cannot be held to include the transportation of goods.

It is very likely that there is no substantial reason why Congress should not extend to express companies, their officers, agents and employés, corresponding privileges for free carriage of goods with those which are given to the officers, agents and employés of railroad companies in respect to transportation of persons, but—if the law is defective in this respect—the remedy must be applied by Congress and not by the courts.

We find no error in the decrees of the Circuit Court, and the same are

Affirmed.